AMERICAN PETROLEUM INSTITUTE, Plaintiff, v. STEPHEN L. JOHNSON, Administrator, United States Environmental Protection Agency, et al., Defendants. MARATHON OIL COMPANY, Plaintiff, v. STEPHEN L. JOHNSON, Administrator, United States Environmental Protection Agency, et al., Defendants.

Civil Action No. 02-2247 (PLF), Civil Action No. 02-2254 (PLF)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

541 F. Supp. 2d 165*; *2008 U.S. Dist. LEXIS 24963*; *67 ERC (BNA) 1497*; *38 ELR 20081

March 31, 2008, Decided

DISPOSITION: The court vacated the new regulatory definition and remanded to the agency for further proceedings.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiffs, a nonprofit oil trade association and a for-profit oil company, sued defendants, the Environmental Protection Agency and others (EPA), in consolidated cases under the Clean Water Act (CWA), *33 U.S.C.S. § 1251 et seq.*, the Administrative Procedure Act (APA), *5 U.S.C.S. § 551 et seq.*, and the Declaratory Judgment Act, *28 U.S.C.S. § 2201*. Environmental groups intervened as defendants. All parties cross-moved for summary judgment.

OVERVIEW: Plaintiffs challenged a new regulation promulgated under the CWA, contending that (1) the new definition of "navigable waters" was impermissibly broad and extended EPA's regulatory authority beyond CWA limits and *Commerce Clause* authority, and (2) the new definition was arbitrary and capricious because EPA failed to offer a rational explanation for its adoption. Intervenors claimed plaintiffs lacked standing and that the claims were not ripe. The court held that plaintiffs had standing because they set forth by declaration sufficient evidence of their injuries, which were fairly traceable to the new definition and would be redressed by a favorable decision. The central issue was presumptively reviewable as it was purely legal and plaintiffs would suffer hardship if it were not considered, so the claims were ripe. The court found that EPA violated the APA by failing to provide a sufficiently clear, cogent and reasoned explanation for its decision to promulgate such a broad definition and offering no indication of which cases it relied on or how it derived support from those cases. Moreover, the court could not square the broad new definition with Supreme Court case law.

OUTCOME: The court vacated the new regulatory definition and remanded to the agency for further proceedings.

LexisNexis(R) Headnotes

Environmental Law > Water Quality > Clean Water Act > Coverage & Definitions > General Overview
Environmental Law > Water Quality > Clean Water Act > Coverage & Definitions > Discharges
Environmental Law > Water Quality > Clean Water Act > Coverage & Definitions > Navigable Waters

Environmental Law > Water Quality > Clean Water Act > Coverage & Definitions > Pollutants

[HN1] The purpose of the Clean Water Act, *33 U.S.C.S. § 1251 et seq.*, is to restore and maintain the physical, biological and chemical integrity of the Nation's waters. Clean Water Act § 101(a), *33 U.S.C.S. § 1251(a)*. In pursuit of this goal, and subject to certain exceptions, the Act prohibits the discharge of any pollutant. Clean Water Act § 301(a), *33 U.S.C.S. § 1311(a)*. A "pollutant" is defined as dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. Clean Water Act § 502(6), *33 U.S.C.S. § 1362(6)*. "Discharge of a pollutant" means any addition of any pollutant to navigable waters. Clean Water Act § 502(12), *33 U.S.C.S. § 1362(12)*. Thus, the Clean Water Act protects only those waters that are "navigable waters" for purposes of the Act, and administrative agencies charged with enforcing the Act -- primarily the Environmental Protection Agency and the United States Army Corps of Engineers -- may exert regulatory authority only over such "navigable waters." Section 502(7) of the Act defines "navigable waters" to mean the waters of the United States, including the territorial seas. Clean Water Act § 502(7), *33 U.S.C.S. § 1362(7)*.

Environmental Law > Water Quality > Clean Water Act > Coverage & Definitions > Discharges

[HN2] Section 311(j) of the Clean Water Act, *33 U.S.C.S. § 1251 et seq.*, in part, authorizes the President of the United States, through the Environmental Protection Agency, to issue regulations establishing procedures, methods, and equipment and other requirements for equipment to prevent discharges of oil and hazardous substances from vessels and from onshore and offshore facilities into navigable waters of the United States, and to contain such discharges. Clean Water Act § 311(j)(1)(C), *33 U.S.C.S. § 1321(j)(1)(C)*.

Environmental Law > Water Quality > Clean Water Act > Coverage & Definitions > Navigable Waters

[HN3] In 1973, Environmental Protection Agency (EPA) promulgated a regulation pursuant to its Clean Water Act (CWA) § 311(j), *33 U.S.C.S. § 1321(j)*, authority which, among other things, required oil-producing facilities that could reasonably be expected to discharge oil into navigable waters to develop spill prevention, control and counter-measure (SPCC) plans. The 1973 SPCC Rule included a regulatory definition of the statutory term "navigable waters." The purpose of this definition was to clarify which waters -- and thus, which oil-producing facilities near such waters -- were subject to EPA's regulatory authority under CWA § 311(j).

Environmental Law > Water Quality > Clean Water Act > Coverage & Definitions > Navigable Waters

[HN4] Under the 1973 spill prevention, control and counter-measure rule (1973 SPCC Rule), the term "navigable waters" of the United States means "navigable waters" as defined in § 502(7) of the Clean Water Act, and includes: (1) all navigable waters of the United States, as defined in judicial decisions prior to passage of the 1972 Amendments of the Clean Water Act and tributaries of such waters; (2) interstate waters; (3) intrastate lakes, rivers, and streams which are utilized by interstate travelers for recreational or other purposes; and (4) intrastate lakes, rivers, and streams from which fish or shellfish are taken and sold in interstate commerce. 1973 SPCC Rule, 38 Fed. Reg. at 34,165.

Environmental Law > Water Quality > Clean Water Act > Coverage & Definitions > Navigable Waters

[HN5] See *40 C.F.R. § 112.2(1)*.

Environmental Law > Water Quality > Clean Water Act > Enforcement > Civil Penalties

[HN6] Parties who fail to comply with regulations issued under § 311(j) (*33 U.S.C.S. § 1321(j)*) of the *33 U.S.C.S. § 1251 et seq.*, are subject to substantial civil penalties. Clean Water Act § 311(b)(6), *33 U.S.C.S. § 1321(b)(6)*.

Civil Procedure > Justiciability > Standing > Burdens of Proof

[HN7] Plaintiffs need not prove the merits of their case in order to establish standing. Standing is a threshold inquiry that in no way depends on the merits of the plaintiff's contention that particular conduct is illegal. Plaintiffs need only set forth, by affidavit, declaration or other permissible means, "specific facts" (which for purposes of summary judgment will be taken as true) demonstrating that a genuine issue of material fact exists as to whether they have been injured in a way that supports standing. *Fed. R. Civ. P. 56(e)(2)*.

Civil Procedure > Justiciability > Standing > General Overview

Civil Procedure > Justiciability > Standing > Injury in Fact

[HN8] U.S. Const. Art. III standing requires individual plaintiffs to show, at an irreducible constitutional mini-

mum: (1) that they have suffered an injury in fact; (2) that the injury is fairly traceable to the defendant's conduct; and (3) that a favorable decision on the merits likely will redress the injury. The alleged injury must be concrete and particularized and actual or imminent, not conjectural, hypothetical or speculative.

Civil Procedure > Justiciability > Standing > Third Party Standing

[HN9] An association may have standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

Administrative Law > Judicial Review > Reviewability > Standing

Civil Procedure > Justiciability > Standing > General Overview

[HN10] In addition to U.S. Const. Art. III's standing requirements, parties bringing suit under the Administrative Procedure Act must establish the "prudential" elements of standing. This is not particularly difficult to do. Plaintiffs must show that their claims fall arguably within the zone of interests to be protected or regulated by the statute in question.

Administrative Law > Judicial Review > Reviewability > Standing

Civil Procedure > Justiciability > Standing > Third Party Standing

[HN11] As the United States Supreme Court has explained, plaintiffs are typically presumed to have constitutional standing when they are directly regulated by a rule: When the suit is one challenging the legality of government action or inaction, the nature and extent of facts that must be averred (at the summary judgment stage) or proved (at the trial stage) in order to establish standing depends considerably upon whether the plaintiff is himself an object of the action (or forgone action) at issue. If he is, there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it. Similarly, the United States Court of Appeals for the D.C. Circuit has suggested that standing is usually self-evident when the plaintiff is a regulated party or an organization representing regulated parties. For example, it has concluded that an association of oil refineries had standing to challenge an Environmental Protection Agency regulation establishing air pollution standards because it was inconceivable that the regulation would fail to affect even a single member of the association.

Administrative Law > Judicial Review > Reviewability > Standing

Civil Procedure > Justiciability > Standing > Injury in Fact

[HN12] Regulatory influences on a firm's business decisions may confer standing when they give rise to cognizable economic injuries or even a "sufficient likelihood" of such injuries.

Administrative Law > Judicial Review > Reviewability > Standing

Civil Procedure > Justiciability > Standing > Injury in Fact

[HN13] The United States Supreme Court routinely recognizes probable economic injury resulting from agency actions that alter competitive conditions as sufficient to satisfy the U.S. Const. Art. III "injury-in-fact" requirement. It follows logically that any petitioner who is likely to suffer economic injury as a result of agency action satisfies this part of the standing test.

Administrative Law > Judicial Review > Reviewability > Standing

Civil Procedure > Justiciability > Standing > Injury in Fact

[HN14] When regulations illegally structure a competitive environment -- whether an agency proceeding, a market, or a reelection race -- parties defending concrete interests in that environment suffer legal harm under U.S. Const. Art. III.

Administrative Law > Judicial Review > Reviewability > Standing

Administrative Law > Judicial Review > Standards of Review > General Overview

[HN15] Where an agency rule causes the injury, the redressability requirement may be satisfied by vacating the challenged rule.

Administrative Law > Judicial Review > Reviewability > Ripeness

Civil Procedure > Justiciability > Case or Controversy Requirements > General Overview

Civil Procedure > Justiciability > Ripeness > Rationale

[HN16] The ripeness doctrine limits the power of federal courts in adjudicating disputes. Its roots are found in both the U.S. Const. Art. III requirement of "case or con-

troversy" and prudential considerations favoring the orderly conduct of the administrative and judicial processes. In the context of administrative action, the doctrine prevents courts through premature adjudication from entangling themselves in abstract disagreements over administrative policies, and it protects agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.

Administrative Law > Judicial Review > Reviewability > Ripeness
Civil Procedure > Justiciability > Ripeness > Tests
[HN17] When considering a ripeness challenge, a court must consider both (1) the fitness of the issues for judicial decision and (2) the hardship to the parties of withholding judicial review. A dispute is generally fit for judicial review if it is legal in nature and no other institutional concerns militate in favor of withholding review. Under the "hardship prong," a court must consider the plaintiff's interests in securing immediate review.

Administrative Law > Judicial Review > Reviewability > Ripeness
Civil Procedure > Justiciability > Ripeness > General Overview
[HN18] Where the legal issue presented is fit for judicial resolution, and where a regulation requires an immediate and significant change in the plaintiffs' conduct of their affairs with serious penalties attached to noncompliance, access to the courts must be permitted, absent a statutory bar or some other unusual circumstance. courts consider both fitness for judicial review and hardship to the parties that would result from withholding judicial consideration; when plaintiffs face the choice of compliance or sanctions, courts should resolve close questions of ripeness in favor of plaintiffs.

Administrative Law > Agency Rulemaking > Formal Rulemaking
[HN19] See *5 U.S.C.S. § 553(c)*.

Administrative Law > Judicial Review > Standards of Review > General Overview
Administrative Law > Judicial Review > Standards of Review > Abuse of Discretion
Administrative Law > Judicial Review > Standards of Review > Arbitrary & Capricious Review
[HN20] See *5 U.S.C.S. § 706(2)(A)*.

Administrative Law > Judicial Review > Standards of Review > Unlawful Procedures
[HN21] See *5 U.S.C.S. § 706(2)(D)*.

Environmental Law > Water Quality > Clean Water Act > Coverage & Definitions > Navigable Waters
[HN22] Navigable waters are not only waters on which a craft may be sailed. Navigable waters include all waters with a past, present, or possible future use in interstate or foreign commerce, including all waters subject to the ebb and flow of the tide. Navigable waters also include intrastate waters which could affect interstate or foreign commerce. The case law supports a broad definition of navigable waters, such as the one published today, and that definition does not necessarily depend on navigability in fact. *67 Fed. Reg. at 47,075*.

Environmental Law > Water Quality > Clean Water Act > Coverage & Definitions > General Overview
Environmental Law > Water Quality > Clean Water Act > Coverage & Definitions > Navigable Waters
[HN23] According to the United States Supreme Court, the Clean Water Act, *33 U.S.C.S. § 1251 et seq.*, was intended to regulate both (1) traditional navigable waters and (2) at least some waters that would not be deemed "navigable" under the classical understanding of that term. Traditional navigable waters are those waters that are (or have been) navigable-in-fact or that reasonably could be so made.

Administrative Law > Separation of Powers > Legislative Controls > General Overview
Constitutional Law > Congressional Duties & Powers > Commerce Clause > General Overview
Environmental Law > Water Quality > Clean Water Act > General Overview
Environmental Law > Water Quality > Clean Water Act > Coverage & Definitions > Navigable Waters
[HN24] Congress did not intend to assert regulatory jurisdiction to the full extent of its *Commerce Clause* power when it enacted the Clean Water Act, *33 U.S.C.S. § 1251 et seq.*; it intended to exert nothing more than its commerce power over navigation -- that is, its authority to regulate commerce by regulating the nation's "navigable waters."

Environmental Law > Water Quality > Clean Water Act > Coverage & Definitions > Navigable Waters
[HN25] See *40 C.F.R. § 112.2(1)(iii)*.

Administrative Law > Agency Rulemaking > General Overview

[HN26] An agency retains a duty to examine key assumptions of a new definition in its regulations as part of its affirmative burden of promulgating and explaining a nonarbitrary, noncapricious rule even if no one objects to those assumptions during the comment period.

Administrative Law > Judicial Review > Standards of Review > General Overview
Administrative Law > Judicial Review > Standards of Review > Abuse of Discretion
Administrative Law > Judicial Review > Standards of Review > Arbitrary & Capricious Review
Administrative Law > Judicial Review > Standards of Review > Unlawful Procedures

[HN27] Judicial review of an agency's new regulatory definition and the procedures by which it was promulgated is governed by *5 U.S.C.S. § 706* of the Administrative Procedure Act. Under *§ 706*, a reviewing court may set aside agency actions, findings, or conclusions when they are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. *5 U.S.C.S. § 706(2)(A)*. A court may also set aside agency action taken without observance of procedure required by law. *5 U.S.C.S. § 706(2)(D)*. In reviewing the agency's actions, the court considers whether the agency acted within the scope of its legal authority, whether the agency has explained its decision, whether the facts on which the agency purports to have relied have some basis in the record, and whether the agency considered all relevant factors.

Administrative Law > Agency Rulemaking > General Overview
Administrative Law > Judicial Review > Standards of Review > Clearly Erroneous Review

[HN28] The Administrative Procedure Act requires agencies to incorporate in the rules adopted a concise general statement of their basis and purpose. *5 U.S.C.S. § 553(c)*. This requirement is not meant to be particularly onerous. Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made. In reviewing that explanation, the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.

Administrative Law > Agency Rulemaking > General Overview

[HN29] An agency must cogently explain why it has exercised its discretion in a given manner, and that explanation must be 'sufficient to enable us to conclude that the agency's action was the product of reasoned decisionmaking. This requirement includes an obligation to explain a decision to depart from a settled course of behavior.

Administrative Law > Agency Rulemaking > General Overview
Administrative Law > Judicial Review > Standards of Review > General Overview

[HN30] It will not do for a court to be compelled to guess at the theory underlying the agency's action. That is why the basis for an administrative decision must be clear enough to permit effective judicial review.

Administrative Law > Judicial Review > Reviewability > Exhaustion of Remedies
Administrative Law > Judicial Review > Standards of Review > General Overview

[HN31] With its delicate balance of thorough record scrutiny and deference to agency expertise, judicial review of agency action can occur only when agencies explain their decisions with precision.

Administrative Law > Agency Rulemaking > Formal Rulemaking

[HN32] Under *5 U.S.C.S. §553(c)* of the Administrative Procedure Act, agencies need only describe the basis and purpose of their regulations in a concise and general way.

Constitutional Law > Congressional Duties & Powers > Commerce Clause > General Overview
Environmental Law > Water Quality > Clean Water Act > Coverage & Definitions > Navigable Waters

[HN33] While Solid Waste Agency of North Cook County v. United States Army Corps of Engineers (SWANCC) may not have established hard-and-fast rules for determining which waters qualify as "navigable waters," it did establish that Clean Water Act, *33 U.S.C.S. § 1251 et seq.*, jurisdiction is not co-extensive with Congress' *Commerce Clause* authority.

Administrative Law > Judicial Review > Standards of Review > Arbitrary & Capricious Review

[HN34] A court may not supply a reasoned basis for an agency's action that the agency itself has not given.

Administrative Law > Judicial Review > Standards of Review > Arbitrary & Capricious Review

[HN35] Post hoc rationalizations advanced to remedy inadequacies in the agency's record or its explanation are bootless.

Administrative Law > Judicial Review > Standards of Review > Arbitrary & Capricious Review
Civil Procedure > Judgments > Relief From Judgment > Motions to Vacate

[HN36] While an agency's failure to set forth a reasoned explanation requires a reviewing court to remand to the agency for further consideration, such a defect does not necessarily require vacatur. The decision whether to vacate hinges on the seriousness of the regulation's deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of vacatur.

Governments > Federal Government > Claims By & Against
Governments > Legislation > Statutes of Limitations > Governmental Entities
Governments > Legislation > Statutes of Limitations > Time Limitations

[HN37] *28 U.S.C.S. § 2401(a)* establishes a six-year statute of limitation for civil claims against the United States.

Civil Procedure > Pleading & Practice > Pleadings > Complaints > Prelitigation Notices
Civil Procedure > Pleading & Practice > Pleadings > Complaints > Requirements

[HN38] Courts have routinely refused to consider claims that were not properly raised in a complaint or amendment/supplement to the complaint.

Administrative Law > Agency Rulemaking > General Overview
Administrative Law > Judicial Review > Reviewability > General Overview
Governments > Federal Government > Claims By & Against
Governments > Legislation > Statutes of Limitations > Time Limitations

[HN39] The reopening doctrine allows an otherwise stale challenge to a regulation to proceed because the agency opened the issue up anew during a subsequent rulemaking proceeding, and then reexamined and reaffirmed its prior decision. The purposes of the reopening doctrine is to ensure that when the agency by some new promulgation creates the opportunity for renewed comment and objection on a regulation that could not be challenged otherwise because of the passage of time, affected parties may seek judicial review, even when the agency decides not to amend that regulation.

Administrative Law > Agency Rulemaking > General Overview
Administrative Law > Judicial Review > Reviewability > General Overview
Governments > Federal Government > Claims By & Against
Governments > Legislation > Statutes of Limitations > Time Limitations

[HN40] The reopening doctrine permits parties to pursue otherwise stale challenges to regulations when an agency's actions show that it has not merely republished an existing rule but has reconsidered the rule and decided to keep it in effect. In other words, the reopening doctrine permits parties to obtain judicial review of an otherwise unchallengeable agency decision by allowing parties to challenge the agency's later decision to reaffirm the earlier decision.

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JUDGES: [**1] PAUL L. FRIEDMAN, United States District Judge.

OPINION BY: PAUL L. FRIEDMAN

OPINION

[*170] This matter is before the Court on plaintiffs' two motions for summary judgment and defendant's and defendant-intervenors' (collectively, "defendants") three cross-motions for summary judgment in two consolidated cases: American Petroleum Institute v. Johnson, Civil Action No. 02-2247, and Marathon Oil Co. v. Johnson, Civil Action No. 02-2254. [1] Plaintiffs bring suit under the Clean Water Act ("the Act"), *33 U.S.C. §§ 1251 et seq.*, the Administrative Procedure Act, *5 U.S.C. §§ 551 et seq.*, and the Declaratory Judgment Act, *28 U.S.C. § 2201*. Plaintiff American Petroleum Institute ("API") is a non-profit, nationwide trade association representing nearly 400 companies engaged in the petroleum and natural gas industry. Plaintiff Marathon Oil Company is a for-profit company that, among other things, refines, markets, and transports petroleum products. Marathon is a member of API.

1 The papers submitted in connection with these motions include: Motion of Plaintiff American Petroleum Institute for Summary Judgment ("API Mot."); Plaintiff API's Combined (1) Memorandum in Opposition to EPA's and Intervenors' Cross-Motions for Summary [**2] Judgment and (2) Reply Memorandum in Support of Plaintiff API's Motion for Summary Judgment ("API Opp. and Reply"); Motion of Plaintiff Marathon Oil Company for Summary Judgment ("Marathon Mot."); Plaintiff Marathon Oil Company's Corrected Combined (1) Reply in Further Support of Its Motion for Summary Judgment and (2) Opposition to EPA's and Intervenors' Cross-Motions for Summary Judgment ("Marathon Opp. and Reply"); Plaintiff Marathon Oil Company's Response to Notice of Supplemental Authority; EPA's Memorandum in Opposition to Plaintiffs' Motions for Summary Judgment and in Support of EPA's Cross-Motion for Summary Judgment ("EPA Mot."); EPA's Reply Memorandum in Support of EPA's Cross-Motion for Summary Judgment ("EPA Reply"); EPA's Notice of Supplemental Authority; Intervenor-Defendant State of New York's Opposition to

Plaintiffs' Motions for Summary Judgment and Cross-Motion for Summary Judgment; Intervenor-Defendant New York's Reply Memorandum in Support of New York and Defendant EPA's Cross-Motions for Summary Judgment; Environmental Intervenors' Cross-Motion for Summary Judgment ("Environmental Intervenors Mot."); Environmental Intervenors' Memorandum (1) Opposing Plaintiffs' [**3] Motion for Summary Judgment, and (2) Supporting Environmental Intervenors' Cross-Motion for Summary Judgment ("Environmental Intervenors Opp."); Environmental Intervenors' Reply in Support of Cross-Motion for Summary Judgment ("Environmental Intervenors Reply"); and Environmental Intervenors' Response to EPA's and Marathon's Notices of Supplemental Authority.

Plaintiffs challenge the substantive and procedural validity of a new regulation promulgated by the Environmental Protection Agency. Plaintiffs contend that (1) EPA's new regulation includes an impermissibly broad definition of the statutory term "navigable waters," which definition (according to plaintiffs) purports to extend EPA's regulatory authority beyond the limits established by the Clean Water Act and Congress' *Commerce Clause* authority, and (2) EPA failed to offer a rational explanation for its new definition of "navigable waters," rendering it arbitrary and capricious under the APA. [2] Because the Court concludes that EPA's promulgation of the new definition of "navigable waters" violated the APA, it does not reach plaintiffs' statutory or constitutional claims.

2 The parties have settled several other claims in these cases [**4] related to the regulation at issue. See API Mot. at 2. Only the claims discussed herein remain.

I. PROCEDURAL HISTORY

API and Marathon filed these lawsuits on November 14, 2002. The Court permitted [*171] the Natural Resources Defense Council and the Sierra Club (collectively, the "Environmental Intervenors") and the State of New York to intervene as defendants on November 13, 2003.

In January and February 2006, the United States Supreme Court heard oral argument in Rapanos v. United States, No. 04-1034, and Carabell v. Army Corps of Engineers, No. 04-1834 (collectively, "Rapanos"). Those consolidated cases addressed the meaning and scope of the term "navigable waters" as used in the Clean Water Act. Because that issue is of considerable significance to these cases, this Court ordered these cases stayed pending the Supreme Court's decision. This Court also denied the parties' pending cross-motions for summary judgment without prejudice to their being refiled after that decision. The Supreme Court issued its decision on June 19, 2006. See *Rapanos v. United States, 547 U.S. 715, 126 S. Ct. 2208, 165 L. Ed. 2d 159 (2006)*. This Court then lifted the stay in these consolidated cases, and the parties filed the motions now before it. [**5] The Court heard oral argument on these motions on February 4, 2008.

II. BACKGROUND

A. The Clean Water Act

[HN1] The purpose of the Clean Water Act is to "restore and maintain the physical, biological and chemical integrity of the Nation's waters." Clean Water Act § 101(a), *33 U.S.C. § 1251(a)*. In pursuit of this goal, and subject to certain exceptions, the Act prohibits the "discharge of any pollutant." Id. § 301(a), *33 U.S.C. § 1311(a)*. A "pollutant" is defined as "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water." Id. § 502(6), *33 U.S.C. § 1362(6)*. "Discharge of a pollutant" means "any addition of any pollutant to *navigable waters* . . . ." Id. § 502(12), *33 U.S.C. § 1362(12)* (emphasis added). Thus, the Clean Water Act protects only those waters that are "navigable waters" for purposes of the Act, and administrative agencies charged with enforcing the Act -- primarily the EPA and the Army Corps of Engineers -- may exert regulatory authority only over such [**6] "navigable waters." *Section 502(7)* of the Act defines "navigable waters" to mean "the waters of the United States, including the territorial seas." Id. § 502(7), *33 U.S.C. § 1362(7)*.

B. The Challenged Definition

[HN2] *Section 311(j)* of the Clean Water Act, in relevant part, authorizes the President, through the EPA, to "issue regulations . . . establishing procedures, methods, and equipment and other requirements for equipment to prevent discharges of oil and hazardous substances from vessels and from onshore and offshore facilities [into navigable waters of the United States], and to contain such discharges." Clean Water Act § 311(j)(1)(C), *33 U.S.C. § 1321(j)(1)(C)*. [HN3] In 1973, EPA promulgated a regulation pursuant to its *Section 311(j)* authority which, among other things, required oil-producing facilities that could reasonably be expected to discharge oil into navigable waters to develop spill prevention, control and counter-measure ("SPCC") plans. See *Non-Transportation Related Onshore and Offshore*

Facilities, 38 Fed. Reg. 34,164 (Dec. 11, 1973) ("1973 SPCC Rule"). [3] The 1973 SPCC Rule included a regulatory definition of the statutory term "navigable waters." The purpose [*172] of this definition [**7] was to clarify which waters -- and thus, which oil-producing facilities near such waters -- were subject to EPA's regulatory authority under *Section 311(j)*. The 1973 SPCC Rule defined "navigable waters" as follows:

> [HN4] The term "navigable waters" of the United States means "navigable waters" as defined in *Section 502(7)* of the [Clean Water Act], and includes:
>
> (1) all navigable waters of the United States, as defined in judicial decisions prior to passage of the 1972 Amendments of the [Clean Water Act] and tributaries of such waters;
>
> (2) interstate waters;
>
> (3) intrastate lakes, rivers, and streams which are utilized by interstate travelers for recreational or other purposes; and
>
> (4) intrastate lakes, rivers, and streams from which fish or shellfish are taken and sold in interstate commerce.

1973 SPCC Rule, *38 Fed. Reg. at 34,165*.

> 3 As their name implies, SPCC plans are intended to reduce the likelihood of an oil spill and, in the event of a spill, to reduce its environmental impact.

EPA proposed substantial revisions to the 1973 SPCC Rule in 1991; it largely adopted those revisions in 2002. See *Oil Pollution Prevention & Response; Non-Transportation-Related Onshore & Offshore Facilities, 67 Fed. Reg. 47,042 (July 17, 2002)*, [**8] codified at 40 C.F.R. § 112 ("2002 SPCC Rule"). Like the 1973 SPCC Rule, the 2002 SPCC Rule includes a regulatory definition of the statutory term "navigable waters." That definition provides:

> [HN5] Navigable waters means the waters of the United States, including the territorial seas.
>
> (1) The term includes:
>
> (i) All waters that are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters subject to the ebb and flow of the tide;
>
> (ii) All interstate waters, including interstate wetlands;
>
> (iii) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation, or destruction of which could affect interstate or foreign commerce including any such waters:
>
> > (A) That are or could be used by interstate or foreign travelers for recreational or other purposes; or
> >
> > (B) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or,
> >
> > (C) That are or could be used for industrial purposes by industries in interstate commerce;
>
> (iv) All impoundments of waters otherwise [**9] defined as waters of the United States under this section;
>
> (v) Tributaries of waters identified in paragraphs (1)(i) through (iv) of this definition;
>
> (vi) The territorial sea; and
>
> (vii) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraph (1) of this definition.

2002 SPCC Rule, *40 C.F.R. § 112.2(1)*.

API and Marathon argue that EPA violated the APA by failing to provide a rational explanation for this new definition -- and in particular the expansive breadth of regulatory authority contemplated by the new definition -- in view of the limits on Clean Water Act jurisdiction imposed by the *Commerce Clause* and by the Clean Water Act itself. In response, EPA argues that its explanation is short but sufficiently clear and rational to satisfy the APA's requirement of reasoned decisionmaking. The Environmental Intervenors argue that plaintiffs lack

standing to challenge the new regulatory definition of "navigable waters," and that, even if [*173] they have standing, their claims are not ripe. As discussed below, the Court concludes that plaintiffs have standing, that plaintiffs' claims are ripe, and that EPA violated the APA by failing to provide a sufficiently [**10] clear, cogent and reasoned explanation for its decision to promulgate such a broad definition of "navigable waters."

III. DISCUSSION

The Court begins by addressing the two threshold issues: (1) whether plaintiffs have standing to challenge EPA's new regulatory definition of "navigable waters," and (2) whether plaintiffs' claims are ripe.

A. Standing

API and Marathon maintain that they are injured by EPA's new regulatory definition of "navigable waters" because it appears to cover more waters (and thus appears to impose regulatory burdens on more oil-producing facilities near such waters) than the previous definition. See API Compl. at 4; Marathon Compl. at 4. According to Marathon, the breadth of EPA's new regulatory definition of "navigable waters" will require the company to spend "millions of dollars" to comply with the 2002 SPCC Rule. Marathon Mot. at 5. As a result, plaintiffs assert that they are put to "the classic Hobson's choice of submitting to costly regulation or paying enforcement penalties." *P & V Enterprises v. Army Corps of Engr's, 516 F.3d 1021, 2008 WL 425523, at *2 (D.C. Cir. 2008)* (internal quotation marks and citation omitted). See API Compl. at 3; Marathon [**11] Compl. at 3. [4] API and Marathon further argue that the new definition causes them injury because it has compelled them to develop SPCC plans at additional facilities that were not previously subject to the SPCC rules, and which may not be subject to Clean Water Act jurisdiction. See API Opp. and Reply at 25; Marathon Opp. and Reply at 31 (arguing that "EPA's limitless definition of 'navigable waters' forces Marathon to prepare SPCC Plans for facilities that can reasonably be expected to discharge oil into *any* area that falls under this definition, even if EPA ultimately has no jurisdiction over the area"); Marathon Opp. and Reply at 31 (as a result of the new definition, "Marathon has had to be over-inclusive in its preparation of SPCC Plans"). Finally, API and Marathon argue that a ruling in their favor would redress their injuries because vacating the definition would eliminate the need to bring additional facilities into compliance with EPA's SPCC rules. See id. at 31-32.

> 4 [HN6] Parties who fail to comply with regulations issued under *Section 311(j)* are subject to substantial civil penalties. See Clean Water Act § 311(b)(6), *33 U.S.C. § 1321(b)(6)*.

EPA does not dispute that plaintiffs have [**12] standing to challenge the new regulatory definition of "navigable waters." The Environmental Intervenors, however, contend that plaintiffs do not have standing. They offer three arguments on this score. First, the Environmental Intervenors maintain that plaintiffs have not established standing because the declarations plaintiffs submitted in support of their standing suffer from certain evidentiary and pleading flaws, namely: (1) the declarants, who have only "general degrees in science," are not competent to offer opinions about navigability or the likelihood of pollution from specific facilities, and their declarations are based on "legally incorrect assumptions about the traditional navigability test"; and (2) the declaration of Dr. Junyang C. Yang is based on hearsay. See Environmental Intervenors Mot. at 14-16. In addition, the Environmental Intervenors argue that plaintiffs have failed to establish standing to challenge certain subsections of the new regulatory definition -- specifically, *subsections (iv)* and *(vii)* -- because plaintiffs' declarations do [*174] not allege any harm from those subsections. According to the Environmental Intervenors:

> The declarations [in support of plaintiffs' [**13] standing] make no claim or showing that plaintiffs or their members have facilities that will be subject to the SPCC program due to the potential of those facilities to spill to impoundments [as prohibited by *subsection (iv)* of the new regulatory definition of "navigable waters"] or wetlands adjacent to covered waters [as prohibited by *subsection (vii)* of the new regulatory definition of "navigable waters"]. The types of waters cited in the declarations are creeks, draws, arroyos, ponds, and rivers -- not impoundments or adjacent wetlands.

Id. at 16.

Second, the Environmental Intervenors argue that plaintiffs have failed to show that their injuries are caused by the new regulatory definition of "navigable waters." The Environmental Intervenors argue as follows: The new regulatory definition of navigable waters replaced a previous definition of navigable waters. The previous definition -- in the Environmental Intervenors' view -- was sufficiently broad to permit EPA to assert regulatory jurisdiction over all of the waters (and hence all of the oil-producing facilities near such waters) that API and Marathon claim would not be subject to EPA's

regulatory jurisdiction but for the new definition [**14] of "navigable waters" in the 2002 SPCC Rule. Thus, the Environmental Intervenors argue, because the facilities identified by plaintiffs as the situs of their injuries were "already covered under the predecessor definition [of "navigable waters,"] then plaintiffs cannot claim injury [traceable to] promulgation of the [new definition of "navigable waters" in the 2002 SPCC Rule]." Environmental Intervenors Mot. at 7-9.

Third, the Environmental Intervenors argue that plaintiffs do not have standing because a ruling in plaintiffs' favor would not redress their purported injuries. According to the Environmental Intervenors, plaintiffs' claims lack redressability because even if this Court were to vacate the new regulatory definition of "navigable waters" in the 2002 SPCC Rule, the effect of such a vacatur would be to restore the previous definition of "navigable waters" -- which, again, the Environmental Intervenors argue was sufficiently broad to permit EPA to assert regulatory jurisdiction over all of the facilities that plaintiffs identify as the situs of their injuries. See Environmental Intervenors Mot. at 11, 13. [5]

> 5 The Environmental Intervenors also argue that plaintiffs' claims lack [**15] redressability because, even if this Court were to vacate the new regulatory definition of "navigable waters," an unchallenged portion of the 2002 SPCC Rule would provide an alternative basis on which to assert regulatory jurisdiction over plaintiffs' facilities. That portion of the 2002 SPCC Rule purports to extend EPA's regulatory jurisdiction beyond discharges to navigable waters and adjoining shorelines to include discharges "that may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United States." 2002 SPCC Rule, *40 C.F.R. § 112.1(b)*.
>
> This argument does not defeat plaintiffs' standing because plaintiffs maintain -- quite plausibly -- that at least some of their facilities are *not* located on federal land or likely to discharge oil or hazardous substances in a way that would affect federal resources. See Marathon Opp. and Reply at 33; id., Ex. 5, Declaration of Mr. Al Learned at 5 ("Most of Marathon's facilities in Oklahoma are located on private lands.").

1. Challenges to Plaintiffs' Declarations

a. "Evidentiary" Challenges

The Environmental Intervenors' attacks on the evidentiary sufficiency of plaintiffs' declarations fail [**16] for two reasons. First, plaintiffs' declarants need not be experts in hydrology nor have a sophisticated [*175] legal understanding of "navigability" in order to demonstrate plaintiffs' injuries for purposes of standing, because [HN7] plaintiffs need not prove the merits of their case in order to establish standing. See, e.g., *Warth v. Seldin, 422 U.S. 490, 500, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975)* (standing is a threshold inquiry that "in no way depends on the merits of the plaintiff's contention that particular conduct is illegal"); *American Library Ass'n v. FCC, 365 U.S. App. D.C. 353, 406 F.3d 689, 696 (D.C. Cir. 2005)*; *American Library Ass'n v. FCC, 365 U.S. App. D.C. 207, 401 F.3d 489, 493 (D.C. Cir. 2005)*; *Sierra Club v. EPA, 352 U.S. App. D.C. 191, 292 F.3d 895, 899-900 (D.C. Cir. 2000)*. Plaintiffs need only set forth, by affidavit, declaration or other permissible means, "specific facts" (which for purposes of summary judgment will be taken as true) demonstrating that a genuine issue of material fact exists as to whether they have been injured in a way that supports standing. *FED. R. CIV. P. 56(e)(2)*; see *Sierra Club v. EPA, 292 F.3d at 899*. Plaintiffs' declarations set forth such "specific facts." Second, plaintiffs have addressed any hearsay objections to the declarants' statements by [**17] submitting revised declarations that do not rely on hearsay. See Marathon Opp. and Reply, Ex. 3, Declaration of Dr. Junyang C. Yang; id., Ex. 5, Declaration of Mr. Al Learned; id., Ex. 6, Declaration of Mr. Vijay Kurki.

b. "Pleading" Challenges

The Court is not persuaded that plaintiffs have forfeited their challenges to *subsections (iv)* and *(vii)* merely because plaintiffs' declarants failed to identify specific "impoundments" and "adjacent wetlands" giving rise to plaintiffs' injuries. While it is true that one *could* read plaintiffs' declarations as omitting any mention of or reference to waters that are properly categorized as "impoundments" or "adjacent wetlands," it is also highly likely that many of the waters mentioned in plaintiffs' declarations could be labeled in various ways, and that the character of some of the waters mentioned in plaintiffs' declarations changes over time. Rather than reject a substantial part of plaintiffs' claims for hypertechnical reasons, the Court concludes that plaintiffs' challenges to *subsections (iv)* and *(vii)* are not barred merely because plaintiffs' declarants failed to use the magic words "impoundment" and "adjacent wetland."

2. Substantive Challenges [**18] to Plaintiffs' Standing

a. Standing Requirements

[HN8] Article III standing requires individual plaintiffs to show, at an "irreducible constitutional minimum": (1) that they have suffered an injury in fact; (2) that the injury is fairly traceable to the defendant's conduct; and

(3) that a favorable decision on the merits likely will redress the injury. See *Friends of the Earth v. Laidlaw, 528 U.S. 167, 180-81, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000)* (citing *Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)*); *Gettman v. DEA, 351 U.S. App. D.C. 344, 290 F.3d 430, 433 (D.C. Cir. 2002)*. The alleged injury must be concrete and particularized and actual or imminent, not conjectural, hypothetical or speculative. See *Friends of the Earth v. Laidlaw, 528 U.S. at 180-81*; *Lujan v. Defenders of Wildlife, 504 U.S. at 560-61*.

[HN9] An association like API may have standing to bring suit on behalf of its members when: "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Washington State Apple* [*176] *Advertising Comm'n, 432 U.S. 333, 343, 97 S. Ct. 2434, 53 L. Ed. 2d 383 (1977)*. [**19] [6]

6 No party disputes that API meets the latter two requirements.

[HN10] In addition to Article III's standing requirements, parties bringing suit under the APA must establish the "prudential" elements of standing. This is not particularly difficult to do. See *Shays v. FEC, 367 U.S. App. D.C. 185, 414 F.3d 76, 83 (D.C. Cir. 2005)*. Plaintiffs must show that their claims fall "arguably within the zone of interests to be protected or regulated by the statute in question." *Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co., 522 U.S. 479, 488, 118 S. Ct. 927, 140 L. Ed. 2d 1 (1998)* (internal quotation marks omitted); see also *Amgen, Inc. v. Smith, 360 U.S. App. D.C. 88, 357 F.3d 103, 108 (D.C. Cir. 2004)*.

b. Have Plaintiffs Established the Elements of Prudential Standing?

Plaintiffs argue that, as parties subject to the 2002 SPCC Rule, their interests are indisputably within the zone of interests to be regulated by *Section 311(j)* and regulations issued pursuant to EPA's *Section 311(j)* authority. See API Mot. at 34; Marathon Mot. at 7. EPA and the Environmental Intervenors do not dispute this proposition, nor could they. The Court therefore concludes that plaintiffs have prudential standing to challenge the new definition.

c. Have Plaintiffs Established the Elements of Constitutional [**20] *Standing?*

[HN11] As the Supreme Court has explained, plaintiffs are typically presumed to have constitutional standing when, as here, they are directly regulated by a rule:

> When the suit is one challenging the legality of government action or inaction, the nature and extent of facts that must be averred (at the summary judgment stage) or proved (at the trial stage) in order to establish standing depends considerably upon whether the plaintiff is himself an object of the action (or forgone action) at issue. *If he is, there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it.*

Lujan v. Defenders of Wildlife, 504 U.S. at 561-62 (emphasis added). Similarly, the D.C. Circuit has suggested that standing is usually self-evident when the plaintiff is a regulated party or an organization representing regulated parties. For example, it has concluded that an association of oil refineries had standing to challenge an EPA regulation establishing air pollution standards because it was "inconceivable" that the regulation "would fail to affect . . . even a single" member of the association. *South Coast Air Quality Mgmt. Dist. v. EPA, 374 U.S. App. D.C. 121, 472 F.3d 882, 895-96 (D.C. Cir. 2006)*; [**21] see also *Fund for Animals, Inc. v. Norton, 355 U.S. App. D.C. 268, 322 F.3d 728, 733-34 (D.C. Cir. 2003)*.

Plaintiffs' declarations are sufficient to establish the elements of constitutional standing under these principles. With respect to the requirement of "injury in fact," no party denies that EPA's regulatory definition of "navigable waters" directly influences the business decisions of Marathon and API's other members. See EPA's Response to Plaintiff API's Statement of Material Facts P 62; EPA's Response to Plaintiff Marathon's Statement of Material Facts P 55; Environmental Intervenors' Response to API's Statement of Material Facts at 3 (claiming lack of sufficient knowledge to deny or affirm this point); Environmental Intervenors' Response to Marathon's Statement of Material Facts (failing to dispute this point). [HN12] Regulatory influences on a firm's business decisions may confer standing when, as [*177] here, they give rise to cognizable economic injuries or even a "sufficient likelihood" of such injuries. *Clinton v. City of New York, 524 U.S. 417, 432-33, 118 S. Ct. 2091, 141 L. Ed. 2d 393 (1998)*. See also *Sabre, Inc. v. Dep't of Transp., 368 U.S. App. D.C. 312, 429 F.3d 1113, 1119 (D.C. Cir. 2005)* (firm established standing to challenge regulation where it was "reasonably [**22] certain that

[the firm's] business decisions [would] be affected" by the regulation). As explained by a leading treatise:

> [HN13] The [Supreme] Court routinely recognizes probable economic injury resulting from agency actions that alter competitive conditions as sufficient to satisfy the [Article III "injury-in-fact" requirement] . . . . It follows logically that any . . . petitioner who is likely to suffer economic injury as a result of agency action satisfies this part of the standing test.

3 RICHARD PIERCE, ADMINISTRATIVE LAW TREATISE § 16.4 at 1122 (4th ed. 2002). Cf. *Shays v. FEC, 414 F.3d at 87* ("[W]hen[HN14] regulations illegally structure a competitive environment -- whether an agency proceeding, *a market*, or a reelection race -- parties defending concrete interests . . . in that environment suffer legal harm under Article III.") (emphasis added). Because plaintiffs are directly regulated by the 2002 SPCC Rule, and because plaintiffs' declarations establish that the regulatory definition of "navigable waters" included in the 2002 SPCC Rule influences their business decisions such that they have incurred and likely will incur substantial costs as a result of the new definition, those declarations [**23] are sufficient to establish that plaintiffs have been "injured" for purposes of the standing analysis.

API and Marathon have also established that their injuries are caused by the new definition and redressable by a ruling in their favor. Plaintiffs have asserted that they would not incur the costs of developing SPCC plans at certain facilities "but for" the new definition -- that is, but for what they perceive to be an expansion of the scope of EPA's regulatory jurisdiction as a result of the new definition. Plaintiffs' injuries therefore are "fairly traceable" to the new definition. *Lujan v. Defenders of Wildlife, 504 U.S. at 560*. Moreover, as plaintiffs identify as the source of their injuries the *expansion* of regulatory authority effected by the new regulatory definition, it follows that plaintiffs' business decisions would not be affected in the same way as they are now even if the new definition was vacated and its predecessor was restored. Thus, it seems "likely, as opposed to merely speculative, that [plaintiffs'] injury will be redressed by a favorable decision." Id. (internal quotation marks and citations omitted). See also *Center For Energy & Econ. Dev. v. EPA, 365 U.S. App. D.C. 65, 398 F.3d 653, 657 (D.C. Cir. 2005)* [**24] ([HN15] "Where an agency rule causes the injury, . . . the redressability requirement may be satisfied by vacating the challenged rule."). Plaintiffs therefore have satisfied all of the elements of constitutional standing.

B. Ripeness

The Environmental Intervenors also challenge this Court's jurisdiction on ripeness grounds. See Environmental Intervenors Reply at 10.

[HN16] The ripeness doctrine "limits the power of federal courts in adjudicating disputes. Its roots are found in both the Article III requirement of 'case or controversy' and prudential considerations favoring the orderly conduct of the administrative and judicial processes." *State Farm Mut. Auto. Ins. Co. v. Dole, 255 U.S. App. D.C. 398, 802 F.2d 474, 479 (D.C. Cir. 1986)*. In the context of administrative action, the doctrine prevents courts through premature adjudication "from entangling themselves in abstract [*178] disagreements over administrative policies," and it "protects agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Laboratories v. Gardner, 387 U.S. 136, 148-49, 87 S. Ct. 1507, 18 L. Ed. 2d 681 (1967)*.

[HN17] When considering a ripeness challenge, a court must consider both (1) the [**25] fitness of the issues for judicial decision and (2) the hardship to the parties of withholding judicial review. See *Abbott Laboratories v. Gardner, 387 U.S. at 149*; *Nat'l Ass'n of Home Builders v. U.S. Army Corps of Engr's, 368 U.S. App. D.C. 23, 417 F.3d 1272, 1281 (D.C. Cir. 2005)*. A dispute is generally fit for judicial review if it is legal in nature and no other institutional concerns militate in favor of withholding review. See *Better Gov't Ass'n v. Dep't of State, 250 U.S. App. D.C. 424, 780 F.2d 86, 92 (D.C. Cir. 1986)*. Under the "hardship prong," a court must consider the plaintiff's interests in securing immediate review. See *Toilet Goods Ass'n v. Gardner, 387 U.S. 158, 164-65, 87 S. Ct. 1520, 18 L. Ed. 2d 697 (1967)*.

Here, the central issue -- whether EPA violated the procedural requirements of the APA -- is purely legal and hence presumptively reviewable. Moreover, plaintiffs have considerable interests in immediate review. Without such review, plaintiffs will have to choose between spending money to develop what they regard as unnecessary SPCC plans or face possible sanctions. As the Supreme Court has noted:

> [HN18] Where the legal issue presented is fit for judicial resolution, and where a regulation requires an immediate and significant change in the plaintiffs' [**26] conduct of their affairs with serious penalties attached to noncompliance, access to the courts . . . must be permitted,

> absent a statutory bar or some other unusual circumstance . . . .

Abbott Laboratories v. Gardner, 387 U.S. at 153. See also *Ciba-Geigy Corp. v. EPA, 255 U.S. App. D.C. 216, 801 F.2d 430, 434-35 (D.C. Cir. 1986)* (courts consider both fitness for judicial review and hardship to the parties that would result from withholding judicial consideration; when plaintiffs face the choice of compliance or sanctions, courts should resolve close questions of ripeness in favor of plaintiffs). The Court concludes that plaintiffs' APA claims are ripe.

C. APA Claims

1. Plaintiffs' Arguments

API and Marathon argue that the new regulatory definition of "navigable waters" in the 2002 SPCC Rule should be set aside under *Sections 553(c)*, *706(2)(A)* and *706(2)(D)* of the APA because it was promulgated without a rational explanation -- and hence arbitrarily, capriciously, and without observance of procedure required by law. See, e.g., API Mot. at 11-14. [7] As discussed more fully below, the argument essentially is that EPA's explanation failed to address "highly relevant recent decisions of the Supreme Court and the lower [**27] federal courts [bearing on the meaning of [*179] the term 'navigable waters']" and reached a conclusion at odds with those decisions. API Mot. at 9. Thus, plaintiffs argue that the explanation either is not "based on a consideration of the relevant factors" or indicates "a clear error of judgment," *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43, 103 S. Ct. 2856, 77 L. Ed. 2d 443 (1983)*, and therefore the new definition must be vacated. See API Mot. at 9, 11-16.

> 7 [HN19] *Section 553(c)* provides that, after providing notice of a rulemaking and allowing interested parties to participate in the rulemaking, "the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose." *5 U.S.C. § 553(c)*.
>
> [HN20] *Section 706(2)(A)* provides that the reviewing court shall "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *5 U.S.C. § 706(2)(A)*.
>
> [HN21] *Section 706(2)(D)* provides that the reviewing court shall "hold unlawful and set aside agency action, findings, and conclusions found to be . . . without observance of procedure required by law." *5 U.S.C. § 706(2)(D)*.

What the parties [**28] refer to as EPA's "explanation" for the new regulatory definition actually appears as a response by the agency to a comment in the 2002 SPCC Rule's statement of "basis and purpose." That comment argues that "the definition [of 'navigable waters' included in the 2002 SPCC Rule is] legally unsupportable because it is so broad." The gist of the comment seems to be that EPA's new regulatory definition conflicts with recent case law defining the term "navigable waters" -- and, perhaps, with the language of the statute and its legislative history as well. EPA responded:

> [HN22] Navigable waters are not only waters on which a craft may be sailed. Navigable waters include all waters with a past, present, or possible future use in interstate or foreign commerce, including all waters subject to the ebb and flow of the tide. Navigable waters also include intrastate waters which could affect interstate or foreign commerce. *The case law supports a broad definition of navigable waters, such as the one published today, and that definition does not necessarily depend on navigability in fact.*

2002 SPCC Rule, *67 Fed. Reg. at 47,075* (emphasis added). API and Marathon argue that, in light of recent Supreme Court [**29] case law, this explanation is too terse, too conclusory and probably wrong as a matter of law. Therefore, say plaintiffs, the explanation demonstrates that the agency did not engage in a course of reasoned decisionmaking when defining the scope of its regulatory jurisdiction.

Plaintiffs' argument is based largely on the decision and the reasoning of the Supreme Court in *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Engr's, 531 U.S. 159, 121 S. Ct. 675, 148 L. Ed. 2d 576 (2001)* ("SWANCC"), a case decided over a year before EPA promulgated its new regulatory definition of "navigable waters." [HN23] In SWANCC, the Supreme Court reaffirmed its view that the Clean Water Act was intended to regulate both (1) traditional navigable waters and (2) "at least some waters that would not be deemed 'navigable' under the classical understanding of that term." *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Engr's, 531 U.S. at 167* (quoting *United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 133, 106 S. Ct. 455, 88 L. Ed. 2d 419 (1985))*. [8]

> 8 Traditional navigable waters are those waters that are (or have been) navigable-in-fact or that reasonably could be so made. See *The Daniel Ball, 77 U.S. 557, 10 Wall. 557, 563, 19 L. Ed.*

999 (1871); see also *Rapanos v. United States, 547 U.S. at 723-24*.

Without [**30] determining precisely which waters fell within the second category, the Supreme Court concluded that the waters at issue in SWANCC -- ponds that were non-navigable, intrastate and isolated (that is, not adjacent to open water) -- were not "navigable waters" for purposes of the Clean Water Act, even though those ponds were arguably connected to interstate commerce because they were occasionally used by migratory birds. See *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Engr's, 531 U.S. at 168*. The Court contrasted those ponds with the "wetlands adjacent to navigable waters" at issue in Riverside Bayview Homes, which were "inseparably bound up with the 'waters' of the United States." [*180] *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Engr's, 531 U.S. at 167* (quoting and citing *United States v. Riverside Bayview Homes, Inc., 474 U.S. at 134-39*). Those ponds, said the Supreme Court, had no "significant nexus" with traditional navigable waters, while the wetlands that actually abutted a navigable waterway in Riverside Bayview Homes did. See *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Engr's, 531 U.S. at 167-68*. This distinction was important because, the [**31] Court reasoned, [HN24] Congress did not intend to assert regulatory jurisdiction to the full extent of its *Commerce Clause* power when it enacted the Clean Water Act; it intended to exert nothing more "than its commerce power over navigation" -- that is, its authority to regulate commerce by regulating the nation's "navigable waters." *Id. at 168 n.3*; see also *id. at 172* (observing that Congress' use of the term "navigable" in the Clean Water Act "has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made"). [9]

> 9 As noted *supra* at 3, the Supreme Court even more recently discussed the scope of the term "navigable waters" in *Rapanos v. United States, 547 U.S. 715, 126 S. Ct. 2208, 165 L. Ed. 2d 159 (2006)*. In Rapanos, Justice Scalia, writing for a plurality, interpreted the Clean Water Act to require "the ordinary presence of water" to support regulatory jurisdiction. *Id. at 731-35*. Justice Scalia concluded that only (1) traditional navigable waters and other "relatively permanent, standing or continuously flowing [bodies] of water connected to traditional interstate navigable [**32] waters" and (2) wetlands with a continuous surface connection to such waters are subject to Clean Water Act jurisdiction. *Id. at 732, 739, 742*. The broader interpretation proffered by the Army Corps of Engineers in that case, wrote Justice Scalia, "stretche[d] the outer limits of Congress's commerce power and raise[d] difficult questions about the ultimate scope of that power." *Id. at 738*. Justice Kennedy, concurring, took a slightly more generous view, arguing that all that is required to support Clean Water Act jurisdiction is a "significant nexus between the wetlands [or other waters] in question and navigable waters in the traditional sense." *Id. at 779* (Kennedy, J., concurring).
>
> It is not entirely clear whether Justice Scalia's test or Justice Kennedy's test now establishes the outer limits of Clean Water Act jurisdiction. See Amanda Bronstad, Wetlands Protection Muddied by Court Rulings, THE NATIONAL LAW JOURNAL at 1 (June 25, 2007). Fortunately, this Court need not resolve that difficult issue, as the instant case requires the Court to answer a much narrower question: whether EPA's explanation of its new regulatory definition of "navigable waters" is adequate in light of *SWANCC* [**33] and other cases of which EPA was aware when it promulgated the 2002 SPCC Rule.

API and Marathon argue that EPA's new regulatory definition of "navigable waters" is -- at the very least -- in considerable tension with the decision and reasoning of SWANCC. For example, as plaintiffs note, *subsection (iii)* of EPA's new regulatory definition purports to assert EPA's authority over

> [HN25] *[a]ll* other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation, or destruction of which *could* affect interstate or foreign commerce . . .

2002 SPCC Rule, *40 C.F.R. § 112.2(1)(iii)* (emphasis added). In plaintiffs' view, this subsection extends EPA's regulatory jurisdiction to the outer limits of the *Commerce Clause* -- and perhaps beyond those limits. See API Mot. at 34; Marathon Mot. at 9-18. See also Heather Keith, United States v. Rapanos: Is "Waters of the United [*181] States" Necessary for Clean Water Act Jurisdiction?, *3 SETON HALL CIRCUIT REV. 565, 581 (Spring 2007)* (observing that EPA's definition of "navigable waters" is "as broad as possible under the *Commerce Clause*"). [**34] That is problematic because SWANCC (and now Rapanos) plainly rejected such an

expansive view of Clean Water Act jurisdiction. See API Opp. and Reply at 2-4.

Plaintiffs contend that, in promulgating a new regulatory definition of "navigable waters" that appears to extend EPA's regulatory authority to the outer limits of the *Commerce Clause*, EPA was obligated -- at the very least -- to address the tension between its new definition and the decision and reasoning of the Supreme Court in SWANCC. See, e.g., API Opp. and Reply at 3. [10] The fact that EPA did not do so convinces plaintiffs that EPA either ignored or failed to appreciate the meaning of SWANCC. See API Mot. at 12-16. In other words, API and Marathon maintain that EPA's explanation is either not "based on a consideration of the relevant factors" or indicates "a clear error of judgment." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. at 43*. Therefore, in their view, the new regulatory definition of "navigable waters" cannot be regarded as a product of reasoned decisionmaking and must be set aside. The Court agrees.

10 Plaintiffs maintain that EPA should have considered other post-SWANCC decisions as well, such [**35] as *Rice v. Harken Exploration Co., 250 F.3d 264 (5th Cir. 2001)*; *United States v. Newdunn, 195 F. Supp. 2d 751 (E.D. Va. 2002)*, *rev'd*, *344 F.3d 407 (4th Cir. 2003)*; *United States v. Rapanos, 190 F. Supp. 2d 1011 (E.D. Mich. 2002)*, *rev'd*, *339 F.3d 447 (6th Cir. 2003)*; and *United States v. Needham, No. 01-1897, 2002 U.S. Dist. LEXIS 23914, 2002 WL 1162790 (W.D. La. Jan. 23, 2003)*, *rev'd on other grounds*, *354 F.3d 340 (5th Cir. 2003)*.

The Environmental Intervenors contend that plaintiffs have waived any argument that EPA was obligated to address SWANCC and other relevant cases because plaintiffs did not make this argument during the rulemaking proceedings. See Environmental Intervenors Mot. at 6, 36-37. As plaintiffs point out, however, [HN26] "EPA retain[ed] a duty to examine key assumptions [of the new definition] as part of its affirmative burden of promulgating and explaining a nonarbitrary, noncapricious rule . . . even if no one object[ed] to [those assumptions] during the comment period." *Appalachian Power Co. v. EPA, 328 U.S. App. D.C. 379, 135 F.3d 791, 818 (D.C. Cir. 1998)* (internal quotation marks and citation omitted). For reasons discussed below, the Court concludes that EPA could not fulfill this duty without at least considering [**36] the implications of SWANCC and explaining its definition of "navigable waters" in light of *SWANCC*. Thus, plaintiffs' failure to make this argument during the comment period is not fatal to the instant challenge. See Marathon Opp. and Reply at 35.

2. Standard of Review

[HN27] Judicial review of EPA's new regulatory definition of "navigable waters" and the procedures by which it was promulgated is governed by *Section 706* of the Administrative Procedure Act. Under *Section 706*, a reviewing court may set aside agency actions, findings, or conclusions when they are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. See *5 U.S.C. § 706(2)(A)*; *Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 375, 109 S. Ct. 1851, 104 L. Ed. 2d 377 (1989)*. A court may also set aside agency action taken "without observance of procedure required by law." *5 U.S.C. § 706(2)(D)*. In reviewing the agency's actions, the Court considers whether the agency acted within the scope of its legal authority, whether the agency has explained its decision, whether the facts on which the agency purports to have relied have some basis in the record, and whether the agency considered all relevant factors. *Marsh v. Oregon Natural Resources Council, 490 U.S. at 378*; [**37] *Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 415-16,* [*182] *91 S. Ct. 814, 28 L. Ed. 2d 136 (1971)*.

3. Analysis

[HN28] The APA requires agencies to "incorporate in the rules adopted a concise general statement of their basis and purpose." *5 U.S.C. § 553(c)*. "[T]his requirement is not meant to be particularly onerous." *Nat'l Mining Ass'n v. Mine Safety and Health Admin., 379 U.S. App. D.C. 262, 512 F.3d 696, 700 (D.C. Cir. 2008)*. Nevertheless,

> the agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made. . . . In reviewing that explanation, [the Court] must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.

Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. at 43 (internal quotation marks and citations omitted). See also *Alpharma, Inc. v. Leavitt, 373 U.S. App. D.C. 65, 460 F.3d 1, 6 (D.C. Cir. 2006)*; *United States Telecom Ass'n v. FCC, 343 U.S. App. D.C. 278, 227 F.3d 450, 460 (D.C. Cir. 2000)* ("It is well-established that [HN29] 'an agency must cogently

explain why it has exercised its discretion in a given manner,' and that explanation must be 'sufficient to enable us to conclude [**38] that the [agency's action] was the product of reasoned decisionmaking'") (internal quotation marks omitted) (quoting *A.L. Pharma, Inc. v. Shalala, 314 U.S. App. D.C. 152, 62 F.3d 1484, 1491 (D.C. Cir. 1995))*. This requirement includes an obligation to explain a decision to depart from a "settled course of behavior." *Int'l Ladies' Garment Workers' Union v. Donovan, 232 U.S. App. D.C. 309, 722 F.2d 795, 813-15 (D.C. Cir. 1983)*; see also *Nuvio Corp. v. FCC, 374 U.S. App. D.C. 162, 473 F.3d 302, 308 (D.C. Cir. 2006)*.

In this case, EPA justified the new regulatory definition of "navigable waters" by stating that "[t]he case law supports a broad definition of navigable waters, such as the one published today." 2002 SPCC Rule, *67 Fed. Reg at 47,075*. EPA's explanation and conclusion are deficient in two respects. First, it is all but impossible for this Court to determine whether EPA's explanation is the result of reasoned decisionmaking because, although EPA's conclusion necessarily comprehends several complex legal issues -- including the meaning of the statutory term "navigable waters," the scope of Clean Water Act jurisdiction, and the limits imposed on Clean Water Act jurisdiction by the *Commerce Clause* -- EPA offers no indication of which cases it relied [**39] upon or how it derived support for its broad definition from those cases. As a result, the Court is left to speculate as to how EPA reached the conclusion that its new, broader regulatory definition is "supported by the case law." And of course, [HN30] "[i]t will not do for a court to be compelled to guess at the theory underlying the agency's action." *SEC v. Chenery Corp., 332 U.S. 194, 196-97, 67 S. Ct. 1575, 91 L. Ed. 1995 (1947)*; see also *Connecticut Dep't of Public Utility Control v. FERC, 376 U.S. App. D.C. 60, 484 F.3d 558, 560 (D.C. Cir. 2007)*. That is why "[t]he basis for an administrative decision . . . must be clear enough to permit effective judicial review." *Int'l Longshoremen's Ass'n v. Nat'l Mediation Bd., 276 U.S. App. D.C. 319, 870 F.2d 733, 735 (D.C. Cir. 1989)*; see also *American Lung Ass'n v. EPA, 328 U.S. App. D.C. 232, 134 F.3d 388, 392 (D.C. Cir. 1998)* ([HN31] "With its delicate balance of thorough record scrutiny and deference to agency expertise, judicial review [of agency action] can occur only when agencies explain their decisions with precision."). EPA's explanation does not meet this standard.

To be clear, the Court is not suggesting that agencies are required to write law review articles (or judicial opinions) justifying their authority each time they promulgate a rule. [**40] See, e.g., *Personal Watercraft* [*183] *Indus. Ass'n v. Dep't of Commerce, 310 U.S. App. D.C. 364, 48 F.3d 540, 545 (D.C. Cir. 1995)* (emphasizing that, [HN32] under *Section 553(c) of the APA*, agencies need only describe the "basis" and "purpose" of their regulations in a "concise" and "general" way). But the circumstances here were peculiar, and they imposed a peculiar burden -- if not a unique burden -- on the EPA. As EPA knows, the scope of Clean Water Act jurisdiction has had a long and complicated history, and much of that history has involved definitions of "navigable waters" analogous to or similar to EPA's new definition. EPA's explanation ignores this history, even though its new regulatory definition of "navigable waters" is -- at best -- in tension with much of it. Moreover, EPA did not assert that its new definition was merely *permitted* by the case law, but rather that it was *supported* by the case law. Surely by invoking "the case law" as a justification for the new definition, EPA obligated itself to provide at least a cursory explanation of its theory. Finally, EPA has itself acknowledged -- both before and after promulgation of the new definition -- that SWANCC was a "significant new ruling by the Supreme Court [**41] pertaining to the scope of regulatory jurisdiction under the Clean Water Act." See API Mot., Ex. 8, Memorandum from EPA General Counsel Gary S. Guzy at 1 (Jan. 19, 2001). That acknowledgment undercuts the assertions of EPA's lawyers in this case that *SWANCC* was not significant enough to merit discussion in the agency's explanation of the new regulatory definition of "navigable waters." See, e.g., EPA Mot. at 59-60.

Second, it is extremely difficult to square EPA's conclusion -- that is, that the case law supports a definition of "navigable waters" as broad as the one included in the 2002 SPCC Rule -- with the decision and reasoning of the Supreme Court in SWANCC. [HN33] While SWANCC may not have established hard-and-fast rules for determining which waters qualify as "navigable waters," it did establish that Clean Water Act jurisdiction is not co-extensive with Congress' *Commerce Clause* authority. See *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Engr's, 531 U.S. at 168 n.3*; see also *Rapanos v. United States, 547 U.S. at 738*. EPA's new regulatory definition, however, appears to assume that Clean Water Act jurisdiction *does* extend to the outer boundaries of Congress' *Commerce Clause* [**42] power. This is particularly true in the case of *subsection (iii)* -- and by necessary implication *subsections (iv)* and *(v)* -- which extends EPA's authority to "[a]ll . . . waters . . . which could affect interstate or foreign commerce . . . ." [11] And the same assumption is all but explicit in EPA's explanation of the new definition, which simply assumes -- with no analysis or qualification -- that the case law supports [*184] such a far-reaching definition of "navigable waters."

> 11 Speaking of language in the Army Corps of Engineers' regulatory definition of "navigable waters" that was identical to *subsection (iii)* of

EPA's new regulatory definition of "navigable waters," the Fourth Circuit said:

> This [section of the Corps' definition of "navigable waters"] purports to extend the coverage of the Clean Water Act to a variety of waters that are intrastate, nonnavigable, or both, solely on the basis that the use, degradation, or destruction of such waters *could* affect interstate commerce. The regulation requires neither that the regulated activity have a *substantial* effect on interstate commerce [as required by *United States v. Lopez, 514 U.S. 549, 115 S. Ct. 1624, 131 L. Ed. 2d 626 (1995)]*, nor that the covered waters have any sort [**43] of nexus with navigable, or even interstate, waters. Were this regulation a statute, duly enacted by Congress, it would present serious constitutional difficulties, because, at least at first blush, it would appear to exceed congressional authority under the *Commerce Clause*.

United States v. Wilson, 133 F.3d 251, 257 (4th Cir. 1997) (discussing *33 C.F.R. § 328.3*).

This assumption that appears to animate EPA's new regulatory definition is consistent with earlier interpretations of Clean Water Act jurisdiction. See, e.g., *United States v. Earth Sciences, Inc., 599 F.2d 368, 375 (10th Cir. 1979)* ("It seems clear Congress intended to regulate discharges made into every creek, stream, river or body of water that in any way may affect interstate commerce. Every court to discuss the issue has used a commerce power approach and agreed upon that interpretation."). But this theory of Clean Water Act jurisdiction did not survive SWANCC. See *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Engr's, 531 U.S. at 168 n.3*; see also *Rice v. Harken Exploration Co., 250 F.3d at 268*; EPA Mot. at 43 (conceding that "[t]he CWA does not permit regulation to the full extent permitted under the *Commerce Clause*"). [**44] The prominence of this assumption in EPA's definition and explanation therefore establishes to a near certainty that the agency failed to consider or failed to come to grips with key factors -- namely, *SWANCC* and cases interpreting SWANCC -- when formulating its new definition of "navigable waters." This the APA will not tolerate. See *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. at 43* (noting that an agency must "examine the relevant data" and base its decision "on a consideration of the relevant factors").

In sum, the Court concludes that EPA's explanation (1) is too conclusory to permit this Court to evaluate its rationality, and (2) impermissibly fails to address (let alone justify) the disconnect between its conclusion and the decision and reasoning of the Supreme Court in SWANCC. The Court therefore cannot conclude that the agency engaged in a course of reasoned decisionmaking. See *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. at 43* (courts may "uphold a decision of less than ideal clarity *if the agency's path may reasonably be discerned* ") (internal quotation marks and citations omitted) (emphasis added). As [HN34] this Court "may not [**45] supply a reasoned basis for the agency's action that the agency itself has not given," id. (internal quotation marks and citations omitted), EPA's new regulatory definition of "navigable waters" must be regarded as arbitrary and capricious.

EPA has three main arguments in response. First, EPA argues that no further explanation was necessary because the new definition merely "changed the description of geographical features that EPA listed as . . . 'waters of the United States,' [and] this was not considered a 'major revision' to the definitions in the SPCC Rule." EPA Mot. at 57. Second, EPA argues that it was not required to provide further analysis because its explanation was intended to "encompass[] a long history of court decisions . . . upholding similar definitions of 'navigable waters' in other regulations." Id. at 59. Third and finally, EPA argues that it was reasonable not to address SWANCC in its explanation of the new definition because "SWANCC was decided after the preparation of the final draft rule, which had first been proposed more than ten years earlier." See id. at 59-60. [12]

> 12 EPA also argues that it was not required to address SWANCC because SWANCC did not facially [**46] strike down any part of the Corps' analogous definition of "navigable waters," nor did it have the far-reaching significance alleged by plaintiffs. See EPA Mot. at 59. This is essentially an argument that SWANCC and cases interpreting SWANCC were not important enough to require discussion (or even acknowledgement) in EPA's explanation of its new definition. The Court already has explained why it disagrees with that view. See *supra* at 23-28.

[*185] None of these arguments is persuasive. The first fails because EPA cannot seriously maintain that the differences between the new definition and its predecessor are merely cosmetic. EPA substantially re-

vised its definition, and so was obligated to explain its reasons for doing so. See, e.g., *Shays v. FEC, 337 F. Supp. 2d 28, 86 (D.D.C. 2004), aff'd, 367 U.S. App. D.C. 185, 414 F.3d 76 (D.C. Cir. 2005)*. The second fails because it asks this Court to rely on counsel's *post hoc* explanations of the agency's behavior and simply ignores the case law contrary to EPA's position. See, e.g., *City of Brookings Municipal Telephone Co. v. FCC, 262 U.S. App. D.C. 91, 822 F.2d 1153, 1165 (D.C. Cir. 1987)* ([HN35] "*Post hoc* rationalizations advanced to remedy inadequacies in the agency's record or its explanation are [**47] bootless."). The third argument, frankly, is silly. The fact that the proposed rule had been on the shelf for ten years is no excuse for failing to consider a directly relevant decision of the Supreme Court decided before the final rule was promulgated. EPA had ample time -- over a year -- to grapple with the implications of *SWANCC*.

IV. REMEDY

A. Remand, Vacatur, Or Both?

Plaintiffs ask this Court to vacate EPA's new regulatory definition of "navigable waters" and remand to the agency, "instructing EPA to propose and submit for public comment a regulation that conforms to Rapanos and fits within the bounds of the CWA." Marathon Mot. at 7; see also API Mot. at 16. EPA argues that the proper remedy for the APA violations discussed above is to remand to the agency for further consideration and explanation consistent with this Opinion without vacating the new definition. See, e.g., EPA Reply at 42. The Court agrees with EPA that it is within the Court's discretion to remand without vacating the new regulatory definition, but it declines to do so.

[HN36] While an agency's failure to set forth a reasoned explanation requires a reviewing court to remand to the agency for further consideration, see *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. at 57*, [**48] such a defect does not necessarily require vacatur. See, e.g., *Advocates for Highway and Auto Safety v. Federal Motor Carrier Safety Admin., 368 U.S. App. D.C. 335, 429 F.3d 1136, 1151 (D.C. Cir. 2005)* ("While unsupported agency action normally warrants vacatur, . . . this court is not without discretion [to remand without vacating]."); *Allied-Signal, Inc. v. Nuclear Regulatory Comm'n, 300 U.S. App. D.C. 198, 988 F.2d 146, 150 (D.C. Cir. 1993)* ("An inadequately supported rule . . . need not necessarily be vacated."). The decision whether to vacate hinges on "the seriousness of the [regulation's] deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences" of vacatur. *Int'l Union, United Mine Workers of America v. Federal Mine Safety and Health Admin., 287 U.S. App. D.C. 186, 920 F.2d 960, 967*.

The Court concludes that both factors militate in favor of vacating the new regulatory definition of "navigable waters" *and* remanding to the agency. First, as discussed above, the deficiencies in EPA's explanation strongly suggest that the agency failed to engage in reasoned decisionmaking. Thus, the Court has significant doubts as to "whether the agency chose correctly" in formulating its new regulatory definition [**49] of "navigable waters." *Int'l Union, United Mine Workers of America v. Federal Mine Safety and Health Admin., 920 F.2d at 967*. Second, EPA has not persuaded this Court that there is "'a serious possibility'" that the agency would be able to offer an adequate explanation for the new definition on remand. [*186] *Milk Train, Inc. v. Veneman, 354 U.S. App. D.C. 25, 310 F.3d 747, 756 (D.C. Cir. 2002)* (quoting *Allied-Signal, Inc. v. Nuclear Regulatory Comm'n, 988 F.2d at 151*). Finally, vacatur will not be disruptive in this case because, after many extensions and delays, the 2002 SPCC Rule is now scheduled to go into effect no earlier than July 1, 2009. See *72 Fed. Reg. 27,443 (May 16, 2007)* (final rule extending compliance dates for the 2002 SPCC Rule). The Court will vacate the new regulatory definition of "navigable waters" and remand these cases to the agency for further proceedings consistent with this Opinion.

B. Effect of Vacatur

Plaintiffs argue that vacatur of the new regulatory definition of "navigable waters" does not restore the previous definition of "navigable waters" included in the 1973 SPCC Rule because (1) EPA "reopened" the issue of the meaning of "navigable waters" by proposing to revise its SPCC rules [**50] in 1991, and (2) "the pre-2002 definition (as interpreted by the Agency) would itself run afoul of SWANCC and Rapanos." API Mot. at 17. Thus, plaintiffs argue that to vacate the new regulatory definition is to condemn the previous definition as well, and to require EPA to rely on the bare terms of the statute to assert its *Section 311(j)* jurisdiction during the pendency of any further agency proceedings. Defendants respond that the agency's rulemaking proceedings did not "reopen" the previous definition of "navigable waters" -- the definition in the 1973 SPCC Rule -- such that plaintiffs may challenge that definition as well. In defendants' view, vacatur will merely "return[] the parties to the *status quo ante*" -- that is, it will merely restore the previous regulatory definition of "navigable waters" pending further proceedings. See EPA Mot. at 63-64.

Defendants have the better of the argument. First, as defendants point out, plaintiffs' complaints do not even hint that they are challenging the previous definition of "navigable waters," and for good reason -- any such

challenge would be time-barred. See [HN37] *28 U.S.C. § 2401(a)* (establishing six-year statute of limitation for civil claims [**51] against the United States). Nor do plaintiffs' papers address the lawfulness of the previous definition except in passing. Under such circumstances, plaintiffs cannot characterize their suits as challenges to both the new definition of "navigable waters" and the definition of "navigable waters" contained in the earlier 1973 SPCC Rule, because plaintiffs did not give defendants "fair notice" of a challenge to the earlier definition. See *Krieger v. Fadely, 341 U.S. App. D.C. 163, 211 F.3d 134, 136 (D.C. Cir. 2000)*; see also *Vaughn v. City of Lebanon, 18 Fed. App'x 252, 272 (6th Cir. 2001)* ([HN38] "Courts have routinely refused to consider claims that were not properly raised in a complaint or amendment/supplement to the complaint.").

Second, the Court rejects plaintiffs' invocation of the "reopening" doctrine to tie the fate of the previous definition of "navigable waters" to that of the new regulatory definition. As the D.C. Circuit has explained, [HN39] "[t]he reopening doctrine allows an otherwise stale challenge [to a regulation] to proceed because the agency opened the issue up anew [during a subsequent rulemaking proceeding], and then reexamined . . . and reaffirmed its [prior] decision." *P & V Enterprises v. Army Corps of Engr's, 516 F.3d 1021, 2008 WL 425523 at *2* [**52] (internal quotation marks and citation omitted). The purposes of the reopening doctrine is to ensure that "when the agency . . . by some new promulgation creates the opportunity for renewed comment and objection [on a regulation that could not be challenged otherwise because of the passage of time], affected parties may seek judicial review, even when the agency decides [*187] not to amend" that regulation. *516 F.3d 1021, Id. at *2* (internal quotation marks and citation omitted).

The reopening doctrine does not permit plaintiffs to challenge the previous definition of "navigable waters" for two reasons. First, as noted above, even assuming that plaintiffs *could* seek judicial review of the previous definition of "navigable waters" on the theory that EPA reopened the 1973 SPCC Rule by initiating rulemaking proceedings in 1991, plaintiffs failed to do so. See *supra* at 32. Second, and more substantively, [HN40] the reopening doctrine permits parties to pursue otherwise stale challenges to regulations when "an agency's actions show that it has not merely republished an existing rule . . . but has reconsidered the rule *and decided to keep it in effect*." *Public Citizen v. Nuclear Regulatory Comm'n, 284 U.S. App. D.C. 41, 901 F.2d 147, 150 (D.C. Cir. 1990)* [**53] (emphasis added). In other words, the reopening doctrine permits parties to obtain judicial review of an otherwise unchallengeable agency decision by allowing parties to challenge the agency's later decision to reaffirm the earlier decision. See 2 RICHARD PIERCE, ADMINISTRATIVE LAW TREATISE § 11.7 at 828 (4th ed. 2002). But of course, EPA did not reconsider and reaffirm its previous definition of "navigable waters"; rather, it decided to abandon the previous definition of "navigable waters" and promulgate a new -- and much different -- definition. [13] Thus, what plaintiffs seek to do is to challenge EPA's previous definition of "navigable waters" on the basis of EPA's decision *not* to reaffirm that definition. That is not what the reopening doctrine contemplates, and API and Marathon point to no authority for the proposition that an agency's decision to reject an otherwise unchallengeable regulation renders that regulation subject to judicial review.

> 13 Indeed, plaintiffs' entire standing theory depends on the idea that there are major differences between the previous definition of "navigable waters" and the new definition adopted as part of the 2002 SPCC Rule. See *supra* at 7-8, 12-16; [**54] see also API Compl. P 15 (arguing that the new definition of "navigable waters" is "significantly more expansive than the pre-existing definition"); Marathon Compl. P 13 (same).

The Court concludes that EPA did not render the previous definition of "navigable waters" subject to judicial review by promulgating a wholly different definition of "navigable waters," and that even if it did, plaintiffs' claims cannot be construed as claims against both the current and the previous definition of "navigable waters." The previous definition of "navigable waters" included in the 1973 SPCC Rule therefore is restored pending further rulemaking or other appropriate agency action, and in the interim EPA may assert its *Section 311(j)* authority on the basis of the 1973 SPCC Rule's definition of "navigable waters." [14]

> 14 Nor will the Court grant plaintiffs' request for an order directing EPA to engage in further rulemaking. To do so would be to usurp the agency's policymaking prerogative. See, e.g., *Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. at 416*. The Court notes, however, that any further proceedings the agency chooses to initiate must take into account not only the issues raised in [**55] this Opinion but also events that occurred after promulgation of the 2002 SPCC Rule, including the Supreme Court's Rapanos decision and cases interpreting *Rapanos*.

V. POSTSCRIPT: PLAINTIFFS' STATUTORY CLAIMS

As noted *supra* at 2, API and Marathon argue that the new regulatory definition of "navigable waters" is

inconsistent with the Clean Water Act. Specifically, plaintiffs argue that the new definition purports to extend EPA's jurisdiction over waters that Congress did not intend to regulate when [*188] it limited the scope of the Clean Water Act to "navigable waters," defined as "the waters of the United States, including the territorial seas." Clean Water Act *§ 502(7)*. See API Mot. at 17-33; Marathon Mot. at 9-14. The Court need not address these claims to resolve the case, because it has concluded that the new regulatory definition of "navigable waters" must be vacated on procedural grounds under the APA. Still, a brief word about plaintiffs' statutory claims is in order.

Both in their papers and at oral argument, plaintiffs contended that the Court should decide whether EPA's new regulatory definition -- which, of course, is an interpretation of a statutory term -- is consistent with the [**56] Clean Water Act under the familiar two-step test set forth in *Chevron USA, Inc. v. Natural Resources Defense Council, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984)*. See, e.g., Marathon Opp. and Reply at 8-13. EPA argued that this Court should instead apply the "no set of circumstances" test of *Reno v. Flores, 507 U.S. 292, 310, 113 S. Ct. 1439, 123 L. Ed. 2d 1 (1991)* (observing that plaintiffs bringing a facial challenge to an agency regulation -- whether on constitutional or statutory grounds -- "must establish that no set of circumstances exists under which the [regulation] would be valid") (internal quotation marks and citations omitted), or the similar "some set of circumstances" test of *INS v. Nat'l Center for Immigrants' Rights, 502 U.S. 183, 188, 112 S. Ct. 551, 116 L. Ed. 2d 546 (1991)* (observing that just because a "regulation may be invalid as applied in [some] cases . . . does not mean that the regulation is facially invalid because it is without statutory authority"). See EPA Mot. at 23-26 (citing *Amfac Resorts, L.L.C. v. U.S. Dep't of the Interior, 350 U.S. App. D.C. 191, 282 F.3d 818 (D.C. Cir. 2002), vacated in part on other grounds sub nom. Nat'l Park Hospitality Ass'n v. Dep't of Interior, 538 U.S. 803, 123 S. Ct. 2026, 155 L. Ed. 2d 1017 (2003))*.

As Judge Henry Kennedy has noted, there is a good deal of confusion in this [**57] Circuit and elsewhere as to when courts should apply Reno v. Flores or INS v. Nat'l Center for Immigrants' Rights, rather than Chevron, when plaintiffs challenge regulations on their face. See *Mineral Policy Center v. Norton, 292 F. Supp. 2d 30, 38-41 (D.D.C. 2003)*. The Court's independent research confirms Judge Kennedy's diagnosis. See, e.g., *Nat'l Mining Authority v. Kempthorne, 379 U.S. App. D.C. 268, 512 F.3d 702, 2008 WL 123836, at *3 (D.C. Cir. 2008)* (applying Chevron); *Exxon Mobil Corp. v. FERC, 378 U.S. App. D.C. 205, 501 F.3d 204, 211 (D.C. Cir. 2007)* (applying a test akin to Reno v. Flores and INS v. Nat'l Center for Immigrants' Rights without citing either case).

While it has no occasion to reach the question in this case, the Court agrees with Judge Kennedy that various factors -- including "the uneven application of the no-set-of-circumstances test, the confusion surrounding the doctrine, and [this Court's] own view that Chevron is adequately deferential to the decisions of administrative agencies" -- all counsel in favor of evaluating facial challenges to regulations on statutory grounds under Chevron. *Mineral Policy Center v. Norton, 292 F. Supp. 2d at 40*. That approach seems especially sound when, as here, [**58] plaintiffs challenge a regulation that embodies an agency's interpretation of statutory language. In any event, that is the course this Court will follow until the Supreme Court or the D.C. Circuit provides further clarification on this issue.

An Order consistent with this Opinion will be issued this same day.

SO ORDERED.

/s/

PAUL L. FRIEDMAN

United States District Judge

DATE: March 31, 2008

ORDER

For the reasons set forth in the Opinion issued this same day, it is hereby

[*189] ORDERED that the motion of plaintiff American Petroleum Institute for summary judgment ([91] in Civil Action No. 02-2247) is GRANTED in part and DENIED in part; it is

FURTHER ORDERED that the motion of plaintiff Marathon Oil Company for summary judgment ([88] in Civil Action No. 02-2254) is GRANTED in part and DENIED in part; it is

FURTHER ORDERED that the motions for summary judgment by the United States Environmental Protection Agency ([93] in Civil Action No. 02-2247 and [91] in Civil Action No. 02-2254); the State of New York ([96] in Civil Action No. 02-2247 and [93] in Civil Action No. 02-2254); and the Natural Resources Defense Council and the Sierra Club ([97] in Civil Action No. 02-2247 and [94] in Civil Action No. 02-2254) are DENIED; and it is

FURTHER ORDERED that the regulatory definition of "navigable waters" contained in the Final Rule entitled Oil Pollution Prevention & Response; Non-Transportation-Related Onshore & Offshore Facili-

ties, *67 Fed. Reg. 47,042* (July 17, 2002), codified at 40 C.F.R. § 112, is vacated and these consolidated cases are remanded to the United States Environmental Protection Agency for further proceedings consistent with the Opinion issued this same day.

The Clerk of this Court shall remove Civil Action No. 02-2247 and Civil Action No. 02-2254 from the docket of this Court. This is a final appealable order. See *FED. R. App. P. 4(a)*.

SO ORDERED.

/s/

PAUL L. FRIEDMAN

United States District Judge

DATE: March 31, 2008

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Send To: BODINE, SUSAN
BARNES & THORNBURG
750 17TH ST NW STE 900
WASHINGTON, DC 20006-4607

To: Traylor, Patrick[traylor.patrick@epa.gov]
From: Bodine, Susan
Sent: Fri 11/3/2017 9:17:52 PM
Subject: RE: Enforcement Weekly

I'll also add Ex. 5 - Deliberative Process

From: Traylor, Patrick
Sent: Friday, November 3, 2017 4:38 PM
To: Bodine, Susan <bodine.susan@epa.gov>
Subject: RE: Enforcement Weekly

What do you think about me walking him through some (but not all) of the attached slide deck showing the extent of the Ex. 5 - Deliberative Process
Ex. 5 - Deliberative Process
Ex. 5 - Deliberative Process his would be more of an orientation to the work of CID through this example, rather than briefing him on a controversial or upcoming case.

In addition, I met with Jessica Taylor today to get her working on a pipeline of interesting cases in various stages of development that we can use going forward.

Patrick Traylor

Deputy Assistant Administrator

Office of Enforcement and Compliance Assurance

U.S. Environmental Protection Agency

(202) 564-5238 (office)

Ex. 6 - Personal Privacy cell)

From: Bodine, Susan
Sent: Friday, November 3, 2017 4:23 PM
To: Traylor, Patrick <traylor.patrick@epa.gov>
Subject: RE: Enforcement Weekly

I'll add Ex. 5 - Deliberative Process and the Oct 27 lead wrap up.

And I'll look at the draft press releases.

Anything from your CID visits?

From: Traylor, Patrick
Sent: Friday, November 3, 2017 4:13 PM
To: Bodine, Susan <bodine.susan@epa.gov>
Subject: Enforcement Weekly

Susan:

I went through the enforcement weekly report and didn't see anything that jumped out at me as worthy of discussion during our meeting with the Administrator.

I started a draft briefing paper for Tuesday, but I only have Ex. 5 - Deliberative Process on it

Patrick

Patrick Traylor

Deputy Assistant Administrator

Office of Enforcement and Compliance Assurance

U.S. Environmental Protection Agency

(202) 564-5238 (office)

Ex. 6 - Personal Privacy (cell)

To: Albert Kelly (kelly.albert@epa.gov)[kelly.albert@epa.gov]
From: Bodine, Susan
Sent: Tue 12/5/2017 7:34:55 PM
Subject: FW: List of 51 sites for Pruitt Alternative approach
presentation.pdf

Ex. 5 - Deliberative Process

Ex. 5 - Deliberative Process

From: Starfield, Lawrence
Sent: Tuesday, December 5, 2017 1:44 PM
To: Bodine, Susan <bodine.susan@epa.gov>
Subject: FW: List of 51 sites for Pruitt Alternative approach

FYI.

From: Browne, Nancy
Sent: Tuesday, December 05, 2017 11:15 AM
To: Starfield, Lawrence <Starfield.Lawrence@epa.gov>
Subject: FW: List of 51 sites for Pruitt Alternative approach

Hi Larry- My apologies. It wasn't the trade press as I stated – the "Pruitt" Alternative Approach was mentioned in a private sector CERCLA webinar. Here is the slide (also attached):

New EPA Administrator "Pruitt" Alternative Approach (51 sites now)

- **No NPL listing**
- **However, HRS score high (28.5 on HRS) needed**

- **Long-term response needed**

- **Clean-up agreement needed**

- **Perhaps no direct EPA oversight**

[With the exception of the last bullet on oversight, this is essentially the Superfund Alternative Approach.]

--Nancy

Nancy Browne |US EPA • Superfund Enforcement | 202.564.4219 | browne.nancy@epa.gov

From: Ergener, Deniz
Sent: Tuesday, November 21, 2017 3:17 PM
To: Browne, Nancy <Browne.Nancy@epa.gov>
Subject: List of 51 sites for Pruitt Alternative approach

Hi Nancy, I listened to a private sector webinar on US government liability today and on page 17 of the attached the presenter made reference to a list of 51 sites for the Pruitt Alternative Approach. Maybe you are already aware of this list? Not sure what it is referring to but thought I should share this info with you based on your SAA work. Deniz

Strafford

Presenting a live 90-minute webinar with interactive Q&A

CERCLA Liability of U.S. Government as Owner, Operator or Arranger for Clean-Up Cost and NRD on Public Lands

Growing Liability Trend In Light of Chevron Mining and El Paso Natural Gas

TUESDAY, NOVEMBER 21, 2017

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

Kirk B. Maag, Partner, **Stoel Rives**, Portland, Ore.

Thomas C. Perry, Partner, **Marten Law**, Boise, Idaho

Stanley A. Millan, Special Counsel, **Jones Walker**, New Orleans

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GOVERNMENT LIABILITY FOR CERCLA RESPONSE COSTS AND/OR NATURAL RESOURCE DAMAGES ON PUBLIC LANDS (2017)

STRAFFORD WEBINAR

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Writer
smillan@joneswalker.com

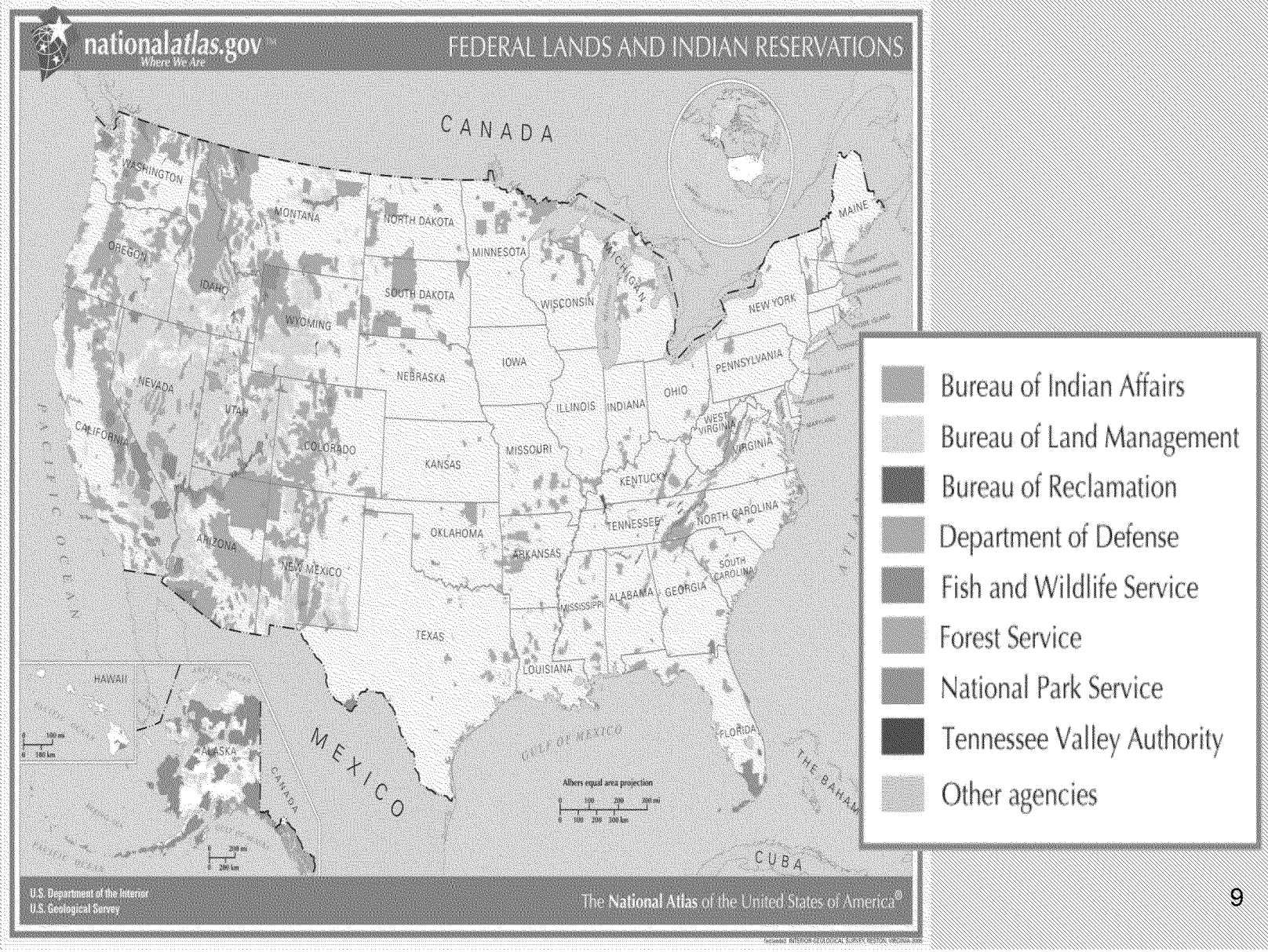
I. OVERVIEW OF CERCLA AND PRP LIABILITY

CERCLA Origins

- Love Canal – 1970s
- 42 U.S.C. §§9601, et seq.
- 1980 – Passed. Looks backward to "sins" of the past.
- 1986 – SARA clarifications
- 2002 – Brownfield amendments
- EPA clean-up originally funded in 1980 by Trust Fund Tax in billions of dollars, "the polluter pays"

- Superfund tax expired in 1995
- Now Superfund has about $1 billion, mostly general revenue
- Currently approximately 1,500 sites on "worst sites" on the NPL (about 150 of which are federal facilities); possibly hundreds of thousands of others
- Significant clean-up costs range from ten million to more than one hundred million dollars
- See chart on federal lands implicated

CERCLA FACES– LITIGATION AND REGULATORY



Litigation Face

1. Elements

- "Release" or "threatened release" of a

  - "hazardous substance" (40 C.F.R. 302.4), from a "facility";

  - which causes "response" costs (not damages)

2. Liability Standards

- Strict
- Retroactive
- §9607 – Joint and several. U.S. v. Atlantic Research Corporation, 551 U.S. 128 (2007) (unless a reasonable method of allocation exists)

3. **Potentially Responsible party (PRP) – See Nu-West, infra, Part II.**
   - Current owner or operator (e.g., lessee), like the "owner", United States, in Chevron Mining
   - Past owner or operator (when disposal occurred)
   - Arranger – intend to dispose. Burlington Northern v. U.S., 129 S.Ct. 1870 (2009). Possession or control of waste an issue in some circuits, like Chevron case.
   - Transporter – who selected disposal site

4. **Defenses, with PRP precautions and due care**
   - Act of God
   - Act of war
   - Act of third party

5. Recovery

- Cost recovery – §107
- EPA Abatement order to PRP– §106
- EPA-funded clean-up – §104
- Private contribution between PRPs– §113, like in two main cases.

6. Cost Recovery

Normally joint and several. Burlington Northern and Atlantic Research, cases, supra

7. Contribution

Equitable shares – Chevron Mining and El Paso cases appear to use this method. Not final.

- distinguishable disposal
- amount of waste
- toxicity
- degree of care
- degree of cooperation
- moral contribution
- other

8. National Contingency Plan is applicable for recovery (40 C.F.R. §300)

- Blueprint for clean-ups. See subpart H for private recovery.

9. Natural Resource Damages – CERCLA case, not over, when it's over. See Part III.

CERCLA Regulatory (NCP) Face

- Site discovery §103
- Site investigation
- Removal action evaluation or preliminary assessment
- NFA, short-term removal action or long-term remedial action for National Priority List (NPL), like "Questa site" in Chevron Mining
- Hazard Ranking System score – air, soil, groundwater and surface water, and vapor media pathways risks assessed
- NPL rulemaking (40 C.F.R. 300)– Vast funds become available for clean-up

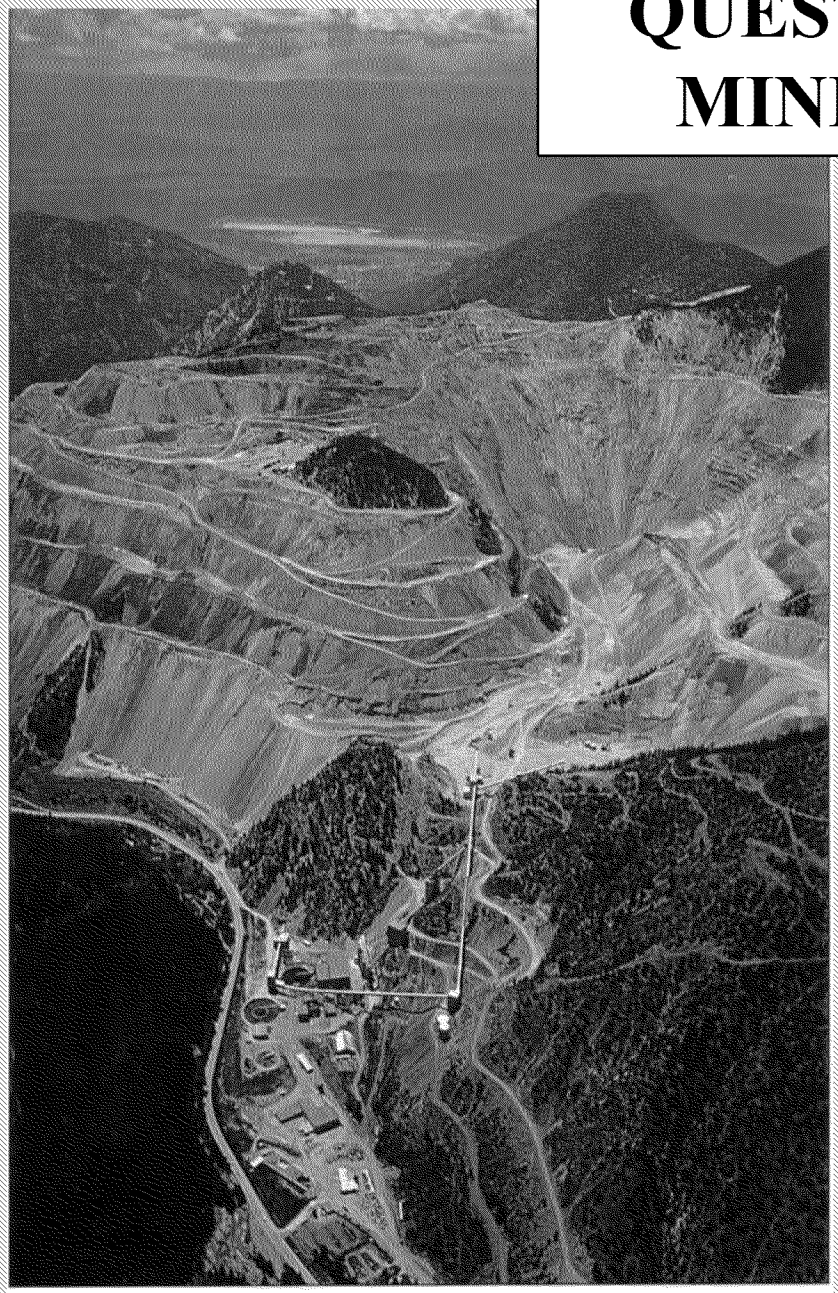
- Remedial investigation/feasibility study – more data and alternatives
- Record of decision for clean-up alternative
  - Threshold criteria – protective of human health and environment and regulatory standards
  - Balancing criteria – e.g., cost
  - Modifying criteria – e.g., state and community acceptance
- Remedial design/remedial action/EPA oversight if private party lead
- State share of funds
- Maintenance
- Construction complete
- Delist from NPL
- No citizen pre-enforcement judicial review of clean-up alternative

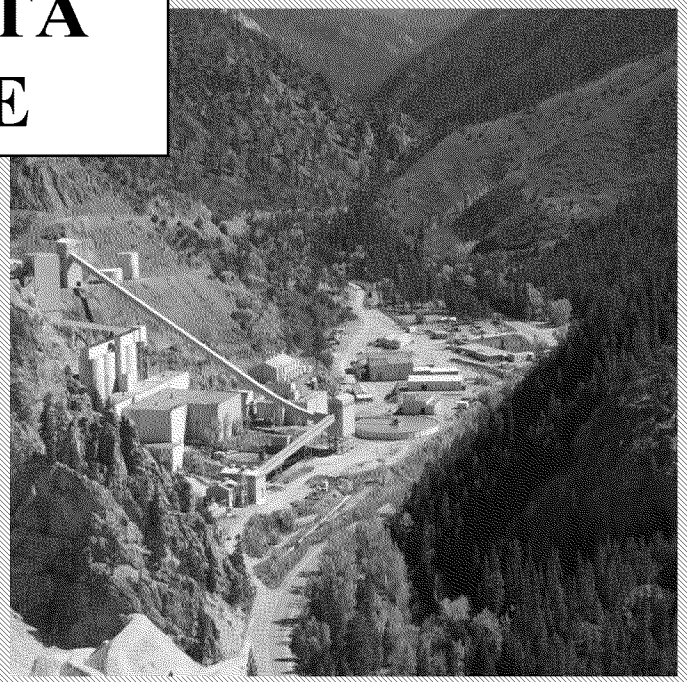
New EPA Administrator "Pruitt" Alternative Approach (51 sites now)

- No NPL listing
- However, HRS score high (28.5 on HRS) needed
- Long-term response needed
- Clean-up agreement needed
- Perhaps no direct EPA oversight

II. RECENT CASE LAW DEVELOPMENTS

QUESTA MINE





OU ID	Name	Types of Contaminants Present at the Time of ROD Completion	Cleanup Technologies Selected in the Decision Document
01	SOURCE	• ALUMINUM • ANTIMONY • AROCLOR 1248 • AROCLOR 1254 • AROCLOR 1260 • ARSENIC • BERYLLIUM • CADMIUM • CHROMIUM, TOTAL • COBALT • COPPER • FLUORIDE • IRON • LEAD • MANGANESE • MOLYBDENUM • NICKEL • NITRATE • NITRATE (AS NO3) • SULFATE • TOTAL DISSOLVED SOLIDS (TDS) • URANIUM • VANADIUM • ZINC	• Chemical Treatment (other, NOS, insitu) • Containment (other, NOS, onsite) • Cover (evapotranspiration) • Cover (soil) • Dewatering • Discharge (other, NOS) • Discharge (surface water/NPDES discharge) • Disposal (offsite) • Drainage/Erosion Control (other, NOS) • Dredging • Excavation • Extraction (recovery/vertical well) • Hydraulic Control (containment) • Institutional Controls • Ion Exchange (P&T, exsitu) • Leachate Control • Membrane Filtration (reverse osmosis, P&T, exsitu) • Monitoring • Neutralization (P&T, exsitu) • Operations & Maintenance (O&M) • Revegetation • Slope Stabilization • Soil Amendments • Solidification/Stabilization (exsitu, onsite) • Treatment (other, NOS, exsitu, onsite) • Treatment (other, NOS, offsite) • Water Supply (temporary replacement, other, NOS)
02	REMOVAL 01		

Chevron Mining v. U.S., 863 F.3d 1261 (10th Cir. 2017)

- National forest lands were mined by Chevron, a successor company, for generations.
- Molybdenum was mined at "Questa site" in New Mexico from 1919 to 2014.
- Molybdenum was essential for national defense; U.S. gave loans for exploration and production, the mining was subject to government approval, on mostly public lands.
- Mining waste disposal included waste rock (300 million tons) and mine tailings (100 million tons). The disposal areas, including ponds, at Questa were owned by the United States at the time of disposal.
- These lands were originally subject to unpatented mining claims which gave the holder superior rights as to third parties but did not transfer land title to the mining company, unless a later patent claim was filed under the General Mining Act of 1972.
- Private entities later acquired ownership of the disposal lands and ponds.

- Chevron had remediated the land, an NPL site on CERCLA, and sought its costs back or contribution from the United States as "owner".

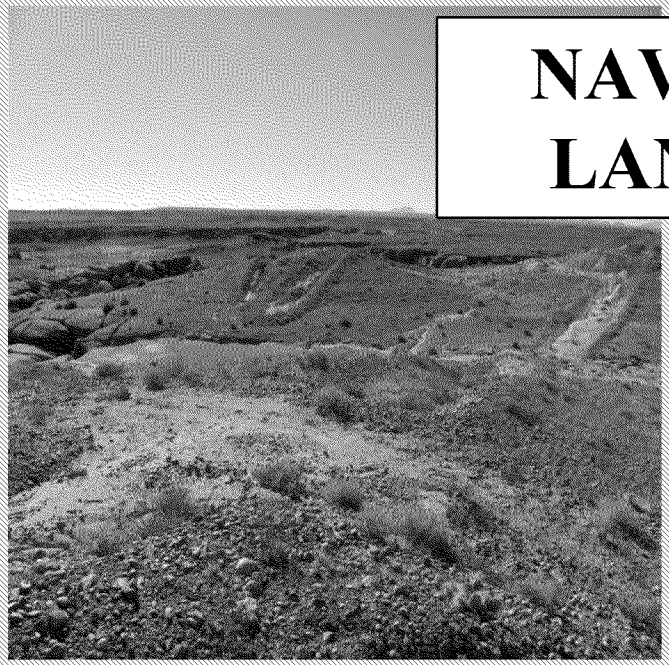
- The government had argued that it did not have "indicia of title" to the unpatented mining lands as it did not control the mining activity. The court used an ordinary meaning of a CERCLA "owner" and held the United States liable as "owner" because it had fee title to these lands.

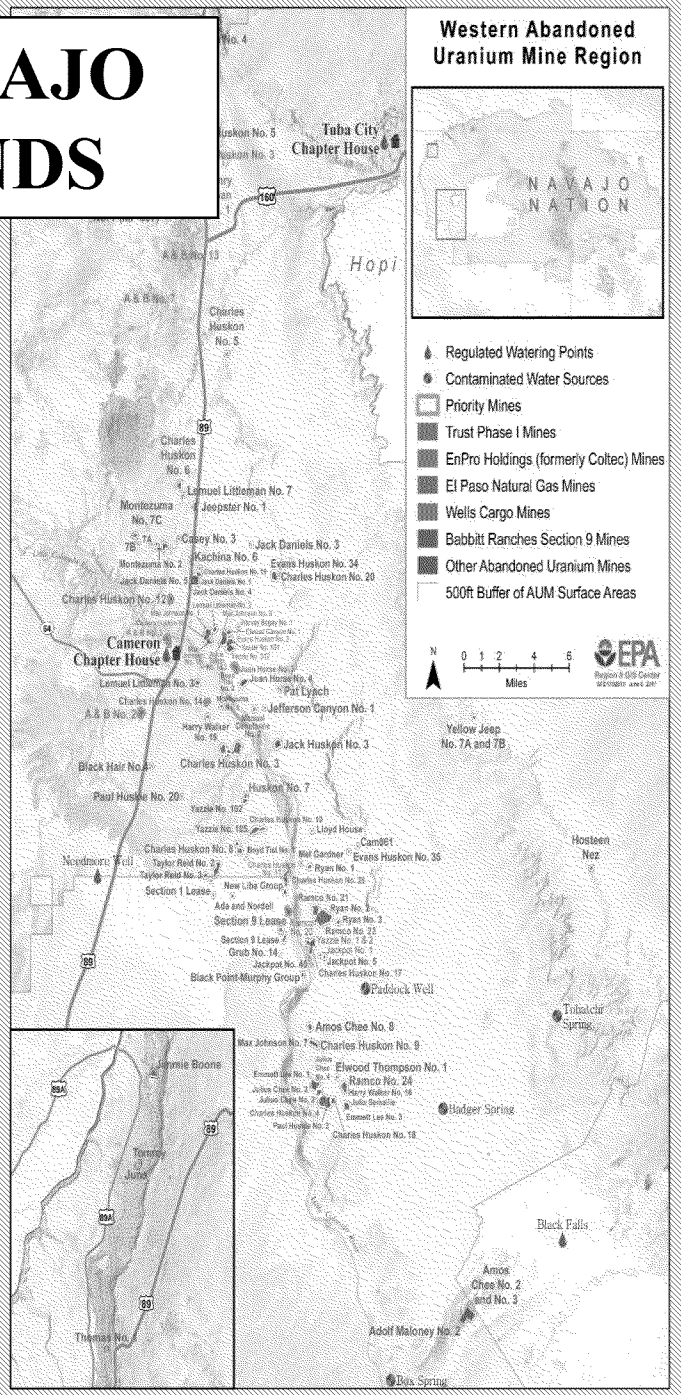
- See §9620(a)(1) of CERCLA, which holds the United States liable as a non-government entity would be liable.

- Chevron lost on the United States also being an "arranger" under CERCLA, because the United States did not own or possess the waste. §9607(a)(3).

- The court remanded to what extent the United States would be equitably liable for Chevron's past, present and future necessary response costs at the Questa site.

NAVAJO LANDS





El Paso National Gas Company, LLC v. U.S., 2017 WL 3492993 (U.S.D.C. D. Arizona, 2017)

- El Paso sought its CERCLA cost recovery and/or a contribution from the United States for its clean-up of nineteen historic uranium mining sites located on a Navajo reservation.
- The United States has fee title to the reservation of lands held in trust for the Navajos.
- The United States argued that it was a trustee only, but the court held a CERCLA "owner" has an ordinary meaning, citing Chevron Mining as one who holds title to the land, the United States here. The Navajos retained a limited right of occupancy only, incapable of alienation (without Congressional approval).
- Tribes are exempt from CERCLA liability.
- The trustee/beneficiary relationship here is not the same as a private trust.
- Congress possesses a paramount right in Indian lands, but the tribes have a compensable interest in the lands from a government taking.

- Equitable allocation of the United States' share of liability remains ahead in future court proceedings. Not resolved.

- The court did not decide at the summary judgment stage if the United States' liability was limited as a fiduciary to the value of the trust land, or if the old Atomic Energy Commission's role in pushing mining went beyond the trustee's role.

- See §9607(n)(1) for a fiduciary safe harbor provision.

- It still seems unclear how much, if any, the United States' cost share will be as a passive owner status or if more was involved.

Other Similar Case Law Development

- In other CERCLA cases, such as landlord/tenant, the landlord's equitable share of its tenant's CERCLA contamination depends on what the landlord did, from a mere passive owner (less than 10%), to a more active role (greater than 30%). See U.S.v. Meyer, Inc., 932 F.3d 568 (6th Cir. 1991) (landlord 30% liable due to ownership, leasing, and faulty sewer construction).

- See Halliburton Energy Services, Inc. v. NL Indus., 648 F.2d 840 (S.D. Tex. 2010) for a survey of lease cases holding lessors liable under CERCLA for 0% to 40% of clean-up costs.

- The United States has been liable under CERCLA for defense production facilities that are called Government Owned Contractor Operated (GOCO).

- See FMC Corp. v. U.S., 29 F.3d 833 (3rd Cir. 1994), in which the court held the United States liable as a CERCLA "operator" at a private production plant due to the extensive control it exerted over wartime production and waste generation. A United States plant was nearby for raw materials used in production, The United States had price controls, the United States supervised work, etc. Note: The United States resists this "substantial control" test in other cases and favors a Bestfoods 118 S. Ct. 1876 (1998), defense of day-to-day control at the plant.

- In Cadillac Fairview/California v. Dow Chemical Co, 299 F.3d 1019 (9th Cir. 2002), the United States was held 100% liable as "owner", "operator", and "arranger" under CERCLA of a GOCO plant (wartime rubber production plant).

- Appendix A to Volume 46Public Contract Law Journal, 259, 355 (2017), has a chart showing the range of United States liability at defense GOCO's from 0% to100%.

- See TDY Holding, LLC v. U.S.A., 872 F.3d 1004 (9th Cir. 2017), United States liable as "owner" for clean-up at aeronautical manufacturing plant which released chromium and chlorinated solvents required by the government during war-time production. Allocation pending on remand.

- Nu-West Mining, Inc. v. U.S., 768 F. Supp. 2d 1082 (D. Id. 2001), a lease case, found the United States liable as "owner", "arranger" and "operator" under CERCLA, based on the government's dictation of reclamation and selenium waste disposal at public phosphate mining sites onNational Forest Service lands.

- Other federal grazing lands, wild horse and burrow lands, and other recreational lands appear to pose less of an environmental risk than mining or defense or nuclear production.

- Formerly utilized defense sites sold may pose a greater risk.

- The problem, besides DOD and DOE lands being cleaned up, is thousands of abandoned mines on Department of Interior (BLM) and Department of Agriculture (USFS) lands that are not inventoried, assessed or cleaned up. Future private PRPs may be identified on these lands, as well as on DOD lands not remediated before being transferred to non-federal entities. See House Commerce Committee Subcommittee on Energy and Environment Hearing on Oveversight of Federal Facility Cleanup Under CERCLA (September 11, 2015).

III. LEVERAGING FEDERAL GOVERNMENT LIABILITY IN CLEAN-UP NEGOTIATIONS, INCLUDING PARALLEL CERCLA LAWSUITS AGAINST THE UNITED STATES

Background

- The United States has waived its sovereign immunity from enforcement of most environmental laws.

- CERCLA at Section 9620(a)(1) states:

  > Each department, agency, and instrumentality of the United States…shall be subject to, and comply with, this chapter in the same manner and to the same extent, both procedurally and substantively, as any non-governmental entity, including liability under Section 9607 of this title.

- Section 9620(c) further establishes an agency hazardous waste compliance docket, requiring further assessment, evaluation and remediation through interagency agreements with the EPA.

- Additional provisions apply to contaminated federal property sold to non-federal entities, including notice of contamination, clean-up results and protective covenants.

- Executive Order 12088 (1978) mandates that federal facilities comply with all federal, state and local environmental requirements.

- EPA has its own policy on enforcement and compliance at federal facilities at www.epa.gov/enforcement/enforcement-and-compliance-federal-facilities.

- EPA tends to use negotiation and mediation with contaminated federal facilities which resist EPA. See GAO-10-348. Individual agencies are responsible for clean-up of their lands, subject to EPA oversight. E.O. 12580 (1987). EPA'S authority is highest on NPL sites.

Government Response to Clean-Up Requests

- Under the "Unitary Executive" doctrine, the Department of Justice will not allow one federal agency to sue another federal agency and will rarely allow EPA to issue a unilateral clean-up order against a federal agency.

- Some defense facilities have resisted EPA enforcement.

- However, courts in private litigation have held the United States as an "owner" as well as "operator" and "arranger" at more agency active sites under CERCLA.

- The United States can "stonewall" private negotiations under CERCLA under the guise of budget restraints or other mission priorities.

- Therefore, negotiating with federal agencies over clean-up has to start from strength. That means a cost recovery or contribution lawsuit against the United States under CERCLA if a private party is tagged by EPA on federal lands or former federal lands

- This strategy includes lands owned by the government as well as lands owned by private parties that are "controlled" by the government

- The unknown in any lawsuit is not so much on the government's liability but on the clean-up cost or contribution that would be allocated to the government by a court.

- Joint and several liability usually applies to cost recovery actions, unless there is a reasonable basis to allocate liability.

- Equitable allocation is not normally the default remedy under Section 9607 since the Atlantic Research case, but courts seem to go with that equitable approach when dealing with the United States government as a PRP or the United States can bring a contribution counterclaim (§9613).

- The degree of government involvement with the site, e.g., production demands, waste, direction, etc., will have a strong bearing on allocation.

- Possibly the United States will insist on more mitigation provisions in mining leases on public lands

- Possibly these types of cases will make EPA reluctant to list public lands on the NPL or use §106 abatement order. Not Pruitt's priority. Who can step in to kick off theissue?

- An indication of defense agency recalcitrance per GAO is that EPA hazardous waste penalties assessed (not adjudicated) against DOD took seven to twenty months of "negotiation" and was settled for about fifty percent of the assessment. Government personnel spent over $300,000 in negotiating (GAO, RCED-97-42). Tough negotiations for the weary. But your resistance to agencies is not futile.

- Possible leveraging the United States is best at the "tail end" of CERCLA liability after some federal liability is established – Natural Resource Damages:
  - not retroactive
  - only trustees can recover
  - need baseline study
  - covers restoration, rehabilitation or replacement of resource
  - covers loss of public use times
  - covers reasonable cost of assessment
  - Trustee assess sum against PRPs

- We are at the next generation of U.S. CERCLA liability (mines); the first generation was and is war plants with 20 years of litigation.

To: Jackson, Ryan[jackson.ryan@epa.gov]; Nancy Beck (beck.nancy@epa.gov)[beck.nancy@epa.gov]
Cc: Patrick Traylor (traylor.patrick@epa.gov)[traylor.patrick@epa.gov]
From: Bodine, Susan
Sent: Thur 11/2/2017 12:51:04 PM
Subject: FW: Vacatur of Black Flag SSUROs

FYI – Black Flag stop sale vacated based on OPP determination that the indole detected is not a pesticide subject to registration.

From: Theis, Joseph
Sent: Thursday, November 2, 2017 8:47 AM
To: Starfield, Lawrence <Starfield.Lawrence@epa.gov>; Traylor, Patrick <traylor.patrick@epa.gov>
Cc: Bodine, Susan <bodine.susan@epa.gov>; Sullivan, Greg <Sullivan.Greg@epa.gov>; Lott, Don <Lott.Don@epa.gov>; Miles, James <miles.james@epa.gov>
Subject: Vacatur of Black Flag SSUROs

Larry and Patrick,

We wanted to let you know that Region 10 intends to vacate the FIFRA SSUROs (FIFRA-10-2017-0105 & 0106) related to the Black Flag Disposable Fly Trap product based on the additional information recently provided by the company. Ex. 5 - Deliberative Process

Ex. 5 - Deliberative Process

Ex. 5 - Deliberative Process

Based on the new information provided, OPP has now concluded that the product is not subject to FIFRA registration requirements, and thus Region 10 plans to move forward with vacatur of the SSUROs.

Please let us know if you have any questions.

- Joe

Joseph G. Theis

Acting Deputy Division Director

Office of Civil Enforcement

Office of Enforcement and Compliance Assurance

U.S. EPA (2243A)

1200 Pennsylvania Ave, NW

Washington, D.C. 20460

(202)564-4053

From: Lott, Don
Sent: Wednesday, November 01, 2017 9:56 AM
To: Kelley, Rosemarie <Kelley.Rosemarie@epa.gov>
Cc: Sullivan, Greg <Sullivan.Greg@epa.gov>; Hellyer, Yvette <Hellyer.Yvette@epa.gov>
Subject: FW: Confirmation Requested: Vacatur FIFRA SSUROs FIFRA-10-2017-0105 & 0106 re Black Flag Disposable Fly Trap

Rosemarie-

Ex. 5 - Deliberative Process

****

Donald J Lott, Associate Director

Waste & Chemical Enforcement Division

(202) 564-2652 - lott.don@epa.gov

****

From: Burnett, Gina
Sent: Wednesday, November 01, 2017 9:40 AM
To: McFadden, Kelly <McFadden.Kelly@epa.gov>
Cc: Dugan, Brett <Dugan.Brett@epa.gov>; Kaczmarek, Chris <Kaczmarek.Chris@epa.gov>; Matthews, Julie <Matthews.Juliane@epa.gov>; Lott, Don <Lott.Don@epa.gov>
Subject: RE: Confirmation Requested: Vacatur FIFRA SSUROs FIFRA-10-2017-0105 & 0106 re Black Flag Disposable Fly Trap

Hi Kelly,

Thank you for sharing the final documents. I have reviewed them and Ex. 5 - Attorney Client

Ex. 5 - Attorney Client

Best Regards,
Gina

Gina Burnett

Senior Regulatory Specialist

Biochemical Pesticides Branch (BPB)
Biopesticides and Pollution Prevention Division (BPPD)
Office of Pesticide Programs
U.S. Environmental Protection Agency
burnett.gina@epa.gov
(703) 605-0513 (phone)
(703) 305-0118 (fax)

From: McFadden, Kelly
Sent: Tuesday, October 31, 2017 2:41 PM
To: Burnett, Gina <Burnett.Gina@epa.gov>
Cc: Dugan, Brett <Dugan.Brett@epa.gov>; Kaczmarek, Chris <Kaczmarek.Chris@epa.gov>; Matthews, Julie <Matthews.Juliane@epa.gov>; Lott, Don <Lott.Don@epa.gov>
Subject: Confirmation Requested: Vacatur FIFRA SSUROs FIFRA-10-2017-0105 & 0106 re Black Flag Disposable Fly Trap
Importance: High

Attorney-Client Privileged

Gina,

Ex. 5 - Attorney Client

Please call Chad Schulze at (206) 553-0505 or Brett Dugan at (206) 553- 8562 if you have questions or would like to discuss this further.

Sincerely,

Kelly

Kelly McFadden, Manager

U.S. EPA Region 10

Pesticides and Toxics Unit

1200 -6th Avenue, Suite 900, OCE-101

Seattle, WA 98101

206-553-1679

To: Starfield, Lawrence[Starfield.Lawrence@epa.gov]
Cc: Patrick Traylor (traylor.patrick@epa.gov)[traylor.patrick@epa.gov]
From: Ex. 5 - Deliberative Process
Sent: Mon 10/23/2017 2:20:39 PM
Subject: F[Ex. 5 - Deliberative Process] Update
Pittsburgh Update.ics

From: Forsgren, Lee
Sent: Monday, October 23, 2017 10:05 AM
To: Bodine, Susan <bodine.susan@epa.gov>; Traylor, Patrick <traylor.patrick@epa.gov>
Subject: [Ex. 5 - Deliberative Process] Update

Susan and Peter,

My apologies, I forgot who else from OECA was on the call on Friday. Could you forward this to the appropriate person(s) in OECA. I know you all have already done great work and we just need to blend the efforts of OECA/OW/R3.

Thanks,

Lee

D. Lee Forsgren

Deputy Assistant Administrator

Office Of Water

Environmental Protection Agency

1200 Pennsylvania Avenue, VW

Room 3219 WJCE

Washington, DC 20460

Phone: 202-564-5700

Forsgren.Lee@epa.gov

16011104T020000

PRODID
-//Microsoft Corporation//Outlook 16.0 MIMEDIR//EN

Version
2.0

METHOD
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X-MS-OLK-FORCEINSPECTOROPEN
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16011104T020000

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TZOFFSETTO
-0500

16010311T020000

Start Date/Time
16010311T020000

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TZOFFSETTO
-0400

Ex. 5 - Deliberative Process Update

Call lir Ex. 6 - Personal Privacy 3219B WJCE 20171023T173000

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RSVP TRUE

Attendee mailto:Drinkard.Andrea@epa.gov
RSVP TRUE

Attendee mailto:Campbell.Ann@epa.gov
RSVP TRUE

Attendee mailto:Grevatt.Peter@epa.gov
RSVP TRUE

Attendee mailto:Servidio.Cosmo@epa.gov
RSVP TRUE

Attendee mailto:rodrigues.cecil@epa.gov
RSVP TRUE

Categories
PUBLIC

CREATED
20171023T140126Z

Description

End Date/Time
20171023T183000

DTSTAMP
20171023T132613Z

Start Date/Time
20171023T173000

Last Modified
20171023T140126Z

Location
Call lin Ex. 6 - Personal Privacy 3219B WJCE

ORGANIZER (CN="Forsgren, Lee")
mailto:Forsgren.Lee@epa.gov

Priority
5

Sequence Number
0

Summary
Pittsburgh Update

Time Transparency
OPAQUE

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mailto:Penman.Crystal@epa.gov

TRIGGER
-PT15M

ACTION

DISPLAY

Description

Reminder

To: Starfield, Lawrence[Starfield.Lawrence@epa.gov]
From: Bodine, Susan
Sent: Tue 11/14/2017 11:12:35 PM
Subject: FW: hiring request
OECA Hiring request.pdf

Ex. 5 - Deliberative Process Let's talk tomorrow.

From: Starfield, Lawrence
Sent: Monday, November 13, 2017 7:38 PM
To: Bodine, Susan <bodine.susan@epa.gov>
Subject: FW: hiring request

FYI.

From: Flynn, Mike
Sent: Monday, November 13, 2017 7:01 PM
To: Starfield, Lawrence <Starfield.Lawrence@epa.gov>
Cc: Badalamente, Mark <Badalamente.Mark@epa.gov>; Vizian, Donna <Vizian.Donna@epa.gov>
Subject: hiring request

Larry,

This is in response to your attached request for an exemption to the external hiring freeze. You requested to hire two additional criminal investigators. Ex. 5 - Deliberative Process

Ex. 5 - Deliberative Process

Let me know if you have any questions.

Thanks, Mike

United States Senate
WASHINGTON, DC 20510

September 13, 2017

Susan Bodine
Special Counsel to the Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Dear Ms. Bodine:

It has come to our attention that you have recently been appointed to the position of "special counsel to the administrator on compliance" at the Environmental Protection Agency (EPA) while your nomination to serve as EPA's Assistant Administrator of the Office of Enforcement and Compliance Assistance (OECA AA) remains under consideration by the Senate. This appointment raises several concerns that we request you address before we can consent to any time agreement to process your nomination.

1. Your appointment as special counsel

The Federal Vacancies Reform Act of 1998 provides, with limited exceptions, the "exclusive means for temporarily authorizing an acting official to perform the functions and duties of any office of an Executive agency … for which appointment is required to be made by the President, by and with the advice and consent of the Senate…." 5 U.S.C. § 3347. Further, as the Supreme Court held in *Buckley v. Valeo*, "any appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States,' and must, therefore, be appointed in the manner prescribed" in Article II, Section 2, clause 2 of the Constitution. 424 U.S. 1, 126 (1976). Accordingly, it would be unlawful for you to assume any of the delegated authorities of the OECA AA before the Senate confirms your nomination while serving as "special counsel."

Your appointment creates the appearance, and perhaps the effect, of circumventing the Senate's constitutional advice and consent responsibility for the position to which you have been nominated. Your improper involvement in EPA enforcement decisions could provide grounds for subjects of EPA actions to challenge the legal validity of those actions in court.[1] To ensure your appointment is not violating the Federal Vacancies Reform Act of 1998, please respond to the following:

- What is your official job title and type of appointment (e.g., non-career SES, Schedule C, administratively-determined)? Who, if anyone, are you supervising? What is your relationship with the Acting OECA AA? If you have a written job description, please provide a copy.

[1] *See, e.g., National Labor Relations Board v. SW General*, 137 S.Ct. 929 (2017) (Vacating an NLRB unfair labor practices complaint because the NLRB general counsel at the time had been appointed in violation of the Federal Vacancies Reform Act).

- Have any duties of the OECA AA been formally delegated to you by the Administrator? Which, if any, OECA AA duties have you or are you presently preforming?
- During your confirmation process, you entered into an ethics agreement that was approved by both EPA and the Office of Government Ethics and presented to this Committee. Are you governed by the same ethics agreement in your current position? Please provide a copy of the signed Trump ethics pledge, and copies of any waivers to the pledge or recusal statements.
- You committed to notifying the Committee of all of your EPA email addresses "within seven days of using a new email address, including any aliases or pseudonyms." Please provide all email addresses you have used since starting at EPA and any new ones within seven days of their use.
- You also committed to "conducting all business using official email addresses and other means and to refrain from any mediums that are outside the Freedom of Information Act's reach." Do you commit to do the same pre-confirmation?
- During previous administrations, senior EPA managers' schedules have been available to the public. Given your extensive work with industries regulated by EPA in the past, will you make your schedule available?

2. Enforcement of the New Source Performance Standard (NSPS) methane oil and gas rule

Several Senators recently wrote to Administrator Pruitt about his continued attempts to undermine the New Source Performance Standard (NSPS) methane oil and gas rule. The letter referenced an email released by EPA stating it would enforce the methane rule on a "case by case" basis. EPA's recent comments about enforcement on a "case by case" basis appear to be a "no action assurance" which can only be issued by the Office of Enforcement and Compliance Assurance Acting Administrator through a written finding.

Now that you are advising the Administrator on compliance issues, you are in a position to answer questions about this policy, the answers to which are important to the Senate's consideration of your nomination.

- Is it your understanding that EPA will enforce the methane rule on a case-by-case basis? If so, were you involved in the formulation this policy? Please explain how EPA's case-by-case approach to compliance with the Methane Rule is consistent with EPA's "No Action Assurance" policy, which dates back to 1984.
- Please provide any written guidance that you have authored or reviewed concerning enforcement of the Methane Rule.
- During your confirmation hearing, you committed to "enforce all regulations that are in effect." Do you believe EPA's "No Action Assurance" should continue to be a basis for EPA's enforcement policy? If not, please explain why.
- Which states have been delegated enforcement authority over the Methane Rule? What oversight and/or assistance will EPA provide these states to ensure that regulated entities are complying with the rule?

- What types of reports and notifications will EPA require states with delegated enforcement authority to submit to the agency to ensure that the states are enforcing the rule?

3. Questions for the record

You declined to answer several questions for the record from members of the Environment and Public Works Committee due to lack of familiarity with the issue or EPA's perspective on it as a nominee. Consistent with your commitment to seek briefings on these issues, we expect that now that you are "special counsel to the administrator on compliance" you have familiarized yourself with these issues and that EPA policies and practices sufficiently to answer the questions we previously asked. We restate those questions and your answers below, and request that you amend your answers to reflect your new position.

1) EPA recently developed the agency's EJ2020 action Agenda to better deliver on its historical promises of reducing disparities in environmental protection. Will you utilize and uphold this guidance and procedures outlined in this document throughout the work of your office? Please explain.
I am not familiar with EPA's EJ2020 action agenda. If confirmed, I will seek a briefing on this guidance.

2) In EPA's environmental justice strategic plan for 2016-2020, OECA is identified as the program leading environmental justice compliance and enforcement. The following strategies in the plan are below. If confirmed, will you commit to implementing each of these strategies in your leadership of the office? If not, why?

a. Direct more EPA enforcement resources to the most overburdened communities;
b. work with federal, state, tribal, and local co-regulatory partners to pursue vigorous enforcement for violations in overburdened communities and leverage limited compliance resources by improving joint planning and targeting of enforcement activities; and
c. strengthen communication so enforcement cases can benefit from the knowledge of local communities, and empower communities with information about pollution and violations that affect them.

I am not familiar with the environmental justice strategic plan for 2016-2020. If I am confirmed I will seek a briefing on it. As I stated above, I agree that communication is important.

3) Are you aware of criticism—including a 2016 United States Commission on Civil Rights report—that EPA has historically done a poor job of enforcing Title VI? Do you agree or disagree? If you agree, what changes would you make? If you disagree, what evidence suggests to you that environmental justice enforcement has been adequate?
I am not familiar with that report. If I am confirmed I will seek a briefing on this issue. As I noted above, in December 2016, EPA reorganized the functions of the formerly Office of Civil Rights (OCR) with respect to its External Compliance and Complaints Program. This external civil rights enforcement function now resides organizationally within the External Civil Rights Compliance Office, which is located in EPA's Office of General Counsel.

4) Early feedback from states, tribes, and associations to the Office of Enforcement and Compliance Assurance's FY2018-2019 National Program Managers Guidance includes a call for the EPA to further "streamline the process for states to gain approval of Alternative Compliance Monitoring Strategies that include allowances for different inspection frequencies and alternative monitoring approaches and to explicitly recognize in the National Program Managers Guidance opportunities for states to use ACMSs."

a. How can OECA streamline the process for allowing states to use ACMSs under the CAA, CWA, and RCRA?

b. How will EPA ensure the ACMSs are meeting overarching enforcement and compliance goals?

I am not familiar with the issues that states, tribes, and associations are raising in their comments. If confirmed, I will request a briefing on these issues.

5) Under your leadership, will you push for greater inclusion of technology-based tools for compliance monitoring and implementation, including electronic reporting and additional air or water quality monitors?

If confirmed, I will request a briefing on "Next Generation" compliance tools.

6) What is the role of Regional Administrators in bringing enforcement actions against polluters?

It is my understanding that EPA Regional Administrators have been delegated significant authority for certain actions. If I am confirmed, I will seek a briefing to fully understand the OECA delegations of authority.

7) On June 5, Attorney General Sessions circulated a memo to all component heads and United States Attorneys barring DOJ attorneys from "enter[ing] into any agreement on behalf of the United States in settlement of federal claims or charges, including agreements settling civil litigation, accepting plea agreements, or deferring or declining prosecution in a criminal matter, that directs or provides for a payment or loan to any non-governmental person or entity that is not a party to the dispute" with limited exceptions.

- Do you interpret Attorney General Sessions' memo to prohibit payments to states, tribes, or local governments as part of a settlement, plea agreement, or other such arrangement?
  With three exceptions, the memo prohibits payments to non-party, non-governmental entities. Thus, it does not appear to apply to payments to governmental entities. If I am confirmed, I will seek a briefing on the intended effect of this memo.

- Do you interpret Attorney General Sessions' memo to prohibit settlement from including provisions like the $2 billion for zero emission vehicle development and $2.7 billion in a trust for states to undertake projects that reduce emissions from vehicles in the VW settlement?
  If I am confirmed, I will seek a briefing on the intended effect of this memo.

- In your experience, do you feel settlement funds in environmental cases have gone to "bankroll third-party special interest groups or the political friends of whoever is in

power" as Attorney General Sessions stated in the press release accompanying his June 7 memo? If so, please provide examples that illustrate your concerns.
If I am confirmed, I will seek a briefing on the actions that this memo is intended to preclude.

- Will you revise or eliminate OECA's Supplemental Environmental Projects Policy to align with Attorney General Sessions' prohibition on third party payments?
I believe that OECA's SEPs policy already conforms to the June 7 memo because it already precludes third party payments. If I am confirmed, I will seek a briefing on the actions that this memo is intended to preclude.

8) Do you believe all covered water systems should follow EPA's drinking water analytical methods when testing drinking water for contamination? If so, what efforts will you undertake to ensure all water systems are brought into compliance?
I am not familiar with the issue raised in this question. If I am confirmed, I will seek a briefing on it.

9) Rhode Island ozone air quality issues are largely due to transported emissions from upwind states leading to ozone formation that pollutes the air and lungs of people in downwind states like mine. The Rhode Island Department of Environmental Management reports that there remain a number of power plants located in upwind states that have pollution control equipment installed to reduce nitrogen oxides emissions that either do not use that equipment during the ozone season or do not use it in a way that optimizes the reduction of nitrogen oxides emissions. Why would this be the case?
I do not know. If confirmed, I will request a briefing on this issue.

You stated that "Congressional oversight is very important," that "you have deep respect for the oversight responsibility of Congress," and that your "bias would always be to respond to any Member of Congress, whether the majority or the minority, and certainly would not see that there would be any change in practice from EPA." Now that you are an employee of EPA, we expect you will act on that philosophy. We look forward to your prompt response as it will help inform how we engage with your nomination.

Sincerely,

Sheldon Whitehouse
United States Senator

Jeffrey A. Merkley
United States Senator

Cc: Senator John Barrasso, Chairman, Environment and Public Works Committee
Senator Thomas Carper, Ranking Member, Environment and Public Works Committee